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In The Supreme Court of the United States

MAUNALUA BAY BEACH OHANA 28,
MAUNALUA BAY BEACH OHANA 29,
MAUNALUA BAY BEACH OHANA 38,
Hawai`i non-profit corporations, individual and
on behalf of all others similarly situated,

Petitioners,

v.

STATE OF HAWAI`I,

Respondent.

**On Petition For Writ Of Certiorari
To The Intermediate Court Of Appeals
Of The State Of Hawai`i**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

For nearly 115 years, littoral owners in Hawai`i held riparian rights to accretion and direct ocean access because their oceanward boundaries moved as beaches accreted and eroded. In 2003, Hawai`i adopted a statute – Act 73 – that, effective immediately, changed both existing and future oceanfront accretions throughout the state into "public lands." Act 73 fixed oceanfront boundaries forever and, as a result, littoral owners lost both existing accretion and their riparian rights. In 2010, the Hawai`i Intermediate Court of Appeals ruled that the State owed just compensation only for accretion that existed in 2003. However, it held riparian rights to a shoreline boundary and future accretion could be taken for free because littoral owners' riparian rights were only contingent interests in future accretion so they were not "property" for takings purposes. That holding directly conflicts with this Court's decisions regarding the nature of riparian rights.

The question presented here is:

> Since this Court has recognized riparian rights are vested property interests, can Hawai`i take those rights, including future accretion, without paying just compensation?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioners are: Maunalua Bay Beach Ohana Nos. 28, 29 and 38, individually and as representatives of a certified class that includes all private beachfront owners in the State of Hawai`i. The Petitioners are non-profit corporations, organized and doing business in Hawai`i. Their members are owners of oceanfront land on the Island of Oahu in the State of Hawai`i.

The State of Hawai`i is the sole respondent.

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PETITION FOR A WRIT OF CERTIORARI

Maunalua Bay Beach Ohana Nos. 28, 29, and 38 (the "Owners") petition for a Writ of Certiorari to review a final judgment of the State of Hawai`i Intermediate Court of Appeals, which the Hawai`i Supreme Court refused to review.

OPINIONS BELOW

The decision of the Hawai`i Intermediate Court of Appeals is published at *Maunalua Bay Beach Ohana 28 v. State of Hawai`i,* 122 Haw. 34, 222 P.3d 441 (2009). The decision of the Hawai`i Supreme Court rejecting the parties' cross-petitions for certiorari (with two justices dissenting) is published at 2010 Haw. LEXIS 119 (June 9, 2010).

JURISDICTION

The Hawai`i Supreme Court's order declining review was issued on June 9, 2010. This Court has jurisdiction under 28 U.S.C. § 1257, which authorizes it to review "[f]inal judgments or decrees rendered by the highest court of a State . . . where any . . . right . . . is specially set up or claimed under the Constitution . . . of . . . the United States."

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, 5th Amendment: " . . . nor shall private property be taken for public use without just compensation."

U.S. Constitution, 14th Amendment: " . . . nor shall any State deprive any persons of . . . property without due process of law."

STATUTORY PROVISIONS INVOLVED

Act 73 of the Hawai`i Legislature, the relevant portions of which were codified in Hawai`i Revised Statutes ("H.R.S.") §§ 171-2, 501-33, and 669-1(e). The Act, and the relevant sections amended by the Act are reprinted in their entirety at App. 106-16.

STATEMENT OF THE CASE

ACCRETION IN HAWAI`I, 1889-2003

Since 1889 – shortly after the Kingdom of Hawai`i first allowed private land ownership – Hawai`i has recognized littoral owners' right to any accretion that occurs along the shoreline.[1] This

[1] Hawai`i has a relatively unique definition of "shoreline." Unlike states such as Florida that define the shoreline based upon high tide lines, in Hawai`i – based upon pre-annexation Hawaiian custom – the shoreline is located at "the upper reaches of the wash of the waves, other than storm and seismic

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principle became firmly fixed in Hawaiian common law based upon numerous decisions of the Hawai`i Supreme Court. *See, e.g., Halstead v. Gay*, 7 Haw. 587 (1889) (accretion belongs to upland owner and the shoreline boundary moves without regard to metes and bounds established in deeds); *In re Sanborn*, 57 Haw. 585, 562 P.2d 771 (1977) (metes and bounds in title documents are only prima facie descriptions and regardless what they show, the seaward boundary is at the "shoreline" as actually marked by the upper reaches of the waves). Over time, as the court below recognized, it became indisputable that the boundary between the upland owners' property and the State of Hawai`i's submerged lands "ambulated" as sand came and went. *Id.*

Prior to May 2003, after accretion formed a littoral owner could either take no action or pursue litigation to establish record title to the accreted area based upon a "shoreline certification."[2] But, as the

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waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves." H.R.S. § 205A-1. In all other respects, Hawai`i law regarding accretion is based upon English common law. *See* H.R.S. § 1-1. Texas also provides public rights up to the line of vegetation.

This definition does not affect the significance of the question presented here, which involves the question whether interests in an ambulatory shoreline that encompasses future accretion are "property." That issue is independent of the criteria used to define the location of the "shoreline."

[2] A landowner can file either a quiet title action (H.R.S. Chapter 669) or a registration petition in the Land Court, which

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Hawai'i court held (App. 61, 65), littoral owners who took no action still owned the accreted area because the legal boundary moved as the shoreline shifted.

ACT 73: BY *IPSE DIXIT* PRIVATE LANDS BECOME PUBLIC AND RIPARIAN RIGHTS DISAPPEAR

In 2002, the Hawai'i legislature responded to pleas to expand the public beaches. However, instead of funding a renourishment project that would move the shoreline seaward, as was at issue in *Beach Nourishment*, the legislature chose a quicker course. It simply passed a bill declaring that, with limited exceptions, the State's "public lands" would henceforth include all existing and future accretion that had not already been "not otherwise awarded" to a private owner though legal proceedings. The bill explicitly prohibited private owners from seeking to establish recorded title to existing or future accretion unless legal proceedings were then underway or the landowner was only seeking to "regain title to the restored portion" of a parcel that had previously eroded. This meant the recorded metes and bounds of beachfront properties – going back to when the land first passed from the Hawaiian monarchy into private

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administers the Torrens title system (H.R.S. Chapter 501). *See, e.g.*, Land Court Rule 26 (state land surveyor shall "check the accretion and/or erosion on the ground and report to the court on the accuracy of the survey).

hands during the 1800s – set the permanent shoreward boundaries, regardless how much accretion had occurred in the intervening decades.

The then-governor vetoed the bill based upon concerns about its constitutionality. Statement of Objections to House Bill No. 2266 by Benjamin J. Cayetano, Governor of Hawai`i, April 26, 2002.

After a new governor was elected, the proposed legislation resurfaced. This time it passed, becoming "Act 73" in May 2003. Without providing any compensation to affected landowners, the Act:

- Turned virtually all existing unregistered and unrecorded accretion into public lands; and
- Fixed littoral owners' shoreward boundaries, thereby eliminating their riparian right to maintain shoreline access as future accretion occurred.

Restricting beachfront owners to fixed boundaries was not part of any plan to develop the State's submerged lands, any plan to improve navigation, or any regulatory scheme involving public resources. It was simply a plan to create bigger public beaches by changing past and future accretion into public land.

THE PROCEEDINGS BELOW

After Act 73 took effect, a class action was filed to obtain just compensation or, alternatively, an injunction against implementation of Act 73. The latter request was based upon a Hawai`i Supreme Court decision (*Allen v. Honolulu*, 58 Haw. 432, 571 P.2d 328 (1977)) that appeared to forbid judicially mandated monetary compensation in inverse condemnation actions.

After the class was certified to include all private beachfront owners, the parties filed cross motions for summary judgment because there were no disputed material facts. The class members' motion was granted; the state's motion was denied. The trial court held Act 73 effected a "taking" and enjoined enforcement of Act 73 unless and until the State compensated the private owners for their existing accretion and their interest in future accretion.

The State appealed. The Hawai`i Intermediate Court of Appeals ("ICA") affirmed in part and reversed in part. It affirmed the trial court's judgment that Act 73 "took" accretion that existed when it took effect and remanded for a trial on whether and to what extent the Owners are entitled to damages.

The ICA reversed the trial court's determination that Act 73 took landowners' rights, as riparian owners, to have their boundaries continue to move and encompass future accretion. (App. 66).

In reversing, the ICA did not dispute that prior to Act 73 the Owners' seaward boundaries were tied directly to the movement of the shoreline and that any accretion automatically belonged to them – that was the basis on which it held Act 73 took all then-existing accretion. However, the ICA held that the fixing of an immoveable boundary – and the resulting loss of future accretion – entailed no taking because landowners had only a contingent future interest in future accretion, and that, it said, is not "property" for constitutional purposes.[3]

The Owners unsuccessfully requested reconsideration from the ICA. App. 68-69. Then, both the Owners and the State timely petitioned for certiorari from the Hawai`i Supreme Court. The State argued landowners suffered no taking because the trial court and the ICA had both erred in deciding that Act 73 took existing unrecorded accretion. The Owners argued that the State had taken more than the ICA acknowledged.

The Hawai`i Supreme Court rejected both petitions on June 9, 2010 (App. 70-105), just 8 days before this Court's decision in *Beach Renourishment*. Under that court's rules (Haw. R. App. Proc. 40(a)), it was

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[3] In reaching this decision, the ICA ignored a number of other cases holding that boundary-fixing statutes violated the property rights of riparian owners. *See* note 9, *infra*.

not possible to ask for reconsideration based upon *Beach Renourishment*.

THE FEDERAL ISSUES WERE PRESENTED BELOW

The Owners' arguments to the trial court, the ICA and the Supreme Court were based upon federal cases. The ICA decision was based upon this Court's decisions. *See, e.g.*, App. at 18, 56, and 60-65.[4] And the two Hawai`i Supreme Court justices, who wanted to take certiorari, relied on this Court's decisions, as well. App. at 94-100.[5]

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[4] The ICA remanded for trial on the issue whether the Petitioners actually suffered the loss of any existing accretion (App. at 66), but that issue does not affect whether the riparian rights to an ambulatory boundary and future accretion were taken without just compensation.

[5] *Cf. Kentucky v. Stincer*, 482 U.S. 730, 735 n. 7 (1987) (viewing decision of state supreme court predicated on federal decisions as presenting federal question, not separate, adequate, and independent state grounds). Here, there can be no independent state ground to justify taking riparian rights without compensation. If anything, Art. I, §19 of the Hawai`i constitution, with its prohibition against both injuring **and** taking without just compensation, would support more compensation, not less. *See also Knutson v. City of Fargo*, 600 F.3d 992, 997 (8th Cir. 2010) (where state and federal "takings clauses" were nearly identical, such that state courts look to both state and federal cases, the issue of violating the federal constitution was necessarily litigated in an inverse condemnation action).

REASONS FOR GRANTING THIS PETITION

A. The Hawai`i Decision And Others Like It Which Deny Any "Property" Interest In Riparian Rights To Future Accretion Are Clearly Contrary To This Court's Past Decisions Regarding The Property Rights Of Littoral Owners

The Hawai`i court – like others before it – disregarded an elemental principle of takings law As this Court's decisions in *County of St. Clair v. Lovingston,* 90 U.S. 46 (1874), and *Stop the Beach Renourishment v. Florida Department of Env. Prot.*, 130 S.Ct. 2592 (2010) ("*Beach Renourishment*"), made clear, riparian rights[6] – even if they are characterized as contingent future interests – are property that cannot be taken without just compensation.

For over 114 years, littoral owners in Hawai`i enjoyed the benefit of accretion and the burden of erosion. Nothing in Hawai`i law impeded movement of the seaward boundary in response to natural forces or limited littoral owners' rights to hold future accretion. Act 73, however, took it all: the existing accretion and the moveable boundary that guarantees shoreline ownership.

In *Lovingston*, this Court analyzed longstanding common law rules and several of its own prior

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[6] "Riparianness also encompasses the vested right to future alluvion, which is an 'essential attribute of the original property.'" *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 326 (1973) (quoting *County of St. Clair v. Lovingston*, 90 U.S. 46 (1874).

decisions, in stating it was "well settled at common law that accretion belongs to the upland owner." 90 U.S. at 68. Further, "The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the [accretion] rests in the law of nature. . . . "

In *Beach Renourishment,* the plurality opinion recapped basic principles of takings jurisprudence. Without contradiction in the concurring opinions, the plurality noted that the parties disputed the nature of littoral owners' interest in accretion. The Petitioner characterized it as an easement; Florida dismissed it as a "contingent future interest," which was not "property." *Beach Renourishment,* 130 S.Ct. at 2601; *Brief of Respondent Florida Department of Environmental Protection,* at 49-50.

The plurality opinion summarily dismissed this disagreement as having no substance because the "Takings Clause . . . applies as fully to the taking of a landowner's riparian rights as it does to the taking of an estate in land." *Beach Renourishment,* 130 S.Ct. at 2601. On that basis, it was unnecessary to be concerned with whether the right to future accretion is only contingent future interest, as Florida argued. *Id.* at 2601, n. 5.

The Hawai`i decision is based upon a directly contrary view of this critical issue. The Hawai`i court parsed the Owners' rights into vested interests (the accretion that existed when Act 73 was adopted) and their "contingent interest" in ownership of future

accretion that a beachfront owner would own if boundaries were not fixed by Act 73. The former had to be paid for; the latter could be taken for free because it was not "vested." App. at 57, 65.

Although *Beach Renourishment* upheld Florida's beach expansion program, nothing about that decision supports the decision below. To the contrary, although the background principle of avulsion supported Florida's actions, it is indisputable that principle does not apply here (since the State of Hawai`i was doing nothing to change the configuration of the beach – it was merely redrawing and fixing the boundary to its liking). In truth, there is nothing in Hawai`i law or otherwise that permits naked boundary changes that serve only to convert private land into public property without just compensation.

Lucas v. South Carolina Coastal Counsel, 505 U.S. 1003 (1992) is also contrary to the Hawai`i decision in this case. In *Lucas*, the state restricted use of littoral land in a manner that constituted a "taking" because the regulatory scheme was excessively restrictive. Here, the state abandoned all pretense of regulation in favor of simply appropriating title.

Nothing in this Court's jurisprudence supports Act 73 or the Hawai`i decision on this issue. To the contrary, this Court made it clear – even before *Beach Renourishment*, that contingent future interests are property, such as those taken by Act 73, cannot be taken without compensation.

For example, in *Babbitt v. Youpee,* 519 U.S. 234, 245 (1977), this Court invalidated, on takings grounds, a statute in which Congress that small interests in Indian land would escheat to the tribe and could not be passed to heirs by descent or devise – even though interests would come into existence (if at all) only in the future. Similarly, when the Florida legislature claimed ownership of interest that might be earned in the future on monies litigants deposited in court, this Court found the statute effected a taking, even though the interest had not yet been earned. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 and 164 (1980) ("[A] State, by *ipse dixit*, may not transform private property into public property without compensation.")

Ignoring these cases, the Hawai`i Court offered several arguments to support its decision that riparian rights can be taken without compensation. Principally, it relied on the Ninth Circuit's 1907 decision in *Western Pacific Ry. Co. v. Southern Pac. Co.,* 151 F. 376, 398-99 (9th Cir. 1907) ("*Western Pacific*"). But, *Western Pacific* and similar cases that give no value to riparian rights[7] cannot be reconciled with this Court's precedents.

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[7] The Hawai'i court and the Ninth Circuit are not the only courts that have disregarded *Lovingston* to hold that the riparian interest in future accretion is not legally protected "property." *See, e.g., Parmalee v. T.L. Herbert & Sons*, 13 Tenn. App. 101 (1930) (it is "absurd" to suggest riparian owner can recover damages for something that is not yet his); *Eisenbach v. Hatfield,* 2 Wash. 236, 26 P. 539 (1891) (riparian owner cannot have

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The decision below and these other cases simply give no weight to *Lovingston*, where, as noted above, this Court unanimously stated (consistently with *Beach Renourishment*) that, "the riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature." 90 U.S. 46, 68-69.

Not all courts have refused to give any credence to *Lovingston*. *See, e.g., Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Assoc., Ltd.*, 512 So.2d 934, 937 (Fla. 1987) (citing *Lovingston* for the principle that riparian right to future alluvion is a vested right and "an inherent and essential attribute of the original property"); *State v. Gill*, 259 Ala. 177, 66 So.2d 141 (1953) (upland owner held entitled to accretion created as a result of government dredging). And, recently, the impropriety of disregarding *Lovingston* was confirmed by the Ninth Circuit in *United States v. Milner,* 583 F.3d 1174, 1186 (9th Cir. 2009), cert. denied *sub nom. Sharp v. United States,* 130 S.Ct. 3273 (2010) (right to accretion is a vested right that "rests in the law of nature"; citing *Lovingston*).

Most importantly, the continuing validity of *Lovingston* underlies the plurality's summary rejection of Florida's argument in *Beach Renourishment* to

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a "present vested right" to that which does not exist). *See also* note 8, *infra*.

the effect there was no "taking" because riparian rights to future accretion and direct ocean access are merely "contingent future interests." 130 S.Ct. at 2601, n. 5. Were it otherwise, this threshold "property" issue could not have been so quickly rejected. *Id.*

Second, *Western Pacific* did not involve the naked appropriation riparian rights; it involved the development of filled land, not unlike the project at issue in *Beach Renourishment.*[8] This case is different. Hawai`i was not asserting any right to develop its submerged land; it was redrawing the boundary for its own gain.[9]

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[8] The Hawai`i court relied on two other cases which cannot sustain its decision. *Cohen v. United States,* 162 F. 364 (C.C. N.D. 1908) involved the diversion of a creek in connection with public harbor improvements which ended a pattern of accretion without affecting the landowners' rights. *Latourette v. United States,* 150 F.Supp. 123 (D. Ore. 1957) involved the alleged adverse effects of a government jetty that was built in aid of navigation. These two cases reflect the unremarkable and undisputed principle – reaffirmed in *Beach Renourishment* – that every littoral owner's rights are subject to the government's correlative right to develop its submerged lands and to take other action to promote navigation and commerce, even if, in doing so, the government blocks riparian access or interferes with future accretion. *See, e.g., Gibson v. United States,* 166 U.S. 269 (1897). This is not such a case.

[9] A number of state courts have assessed the validity of schemes in which states have tried to substitute fixed boundaries for ambulatory boundaries affecting riparian property. In every such case, the state court has held that the new boundaries took private property or constituted an unlawful exercise of police power. *See, e.g., Purdie v. Attorney General,* 143 N.H. 661,

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Third, and perhaps most importantly, the dicta in *Western Pacific*, to the effect that "the right to future possible accretion could be divested by legislative action," (151 F. at 299; quoted by the ICA at 122 Haw. 53, 222 P.3d at 460) cannot be reconciled with this Court's decisions in *Babbitt* (rejecting legislation taking contingent future interests in tribal property), *Webb's Fabulous Pharmacies* (invalidating legislation taking contingent interest in future interest), and *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001), where this Court rejected the notion that the State can use prospective legislation to take property without compensation merely because property owners are on "notice" of onerous land use regulations.

Riparian rights to accretion and an "ambulatory boundary," were – until Act 73 – firmly established in Hawai`i law until 2003. They were one of the indisputable attributes of littoral land ownership. And, as Justice Thurgood Marshall explained:

> Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way. Indeed, our cases

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666-67, 732 A.2d 442, 447 (1999) (upholding common law rule that the private-public coastal boundary is the mean high tide, wherever it is determined to be); *Board of Trustees v. Medeira Beach Nominee, Inc.*, 272 So.2d 209, 211-12 (Fla. Ct. App. 1973) ("Freezing the [shoreline] boundary at a point in time" held improper); *Soo Sand & Gravel v. M. Sullivan Dredging*, 244 N.W. 138, 140-41 (Mich. 1932) (state cannot impair the rights of a riparian owner by obstructing his access to the water).

> demonstrate that there are limits on governmental authority to abolish "core" common-law rights, including rights against trespass, at lease with a compelling showing of necessity or a provision for a reasonable alternative remedy.

PruneYard Shopping Center v. Robins, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring). Riparian rights are precisely this type of "core" property interest because, as recognized in *Lovingston* (as well as Hawai`i cases, such as *Halstead v. Gay, supra*) the right to accretion has long been settled as an incident of littoral land ownership.

The Hawai`i court also relied on Art. XI, § 1 of the 1979 Constitution which says the State "shall conserve and protect Hawai`i's natural beauty and all natural resources . . . [which] are held in trust by the State for the benefit of the people." This provision, the ICA held (122 Haw. at 54, 222 P.3d at 461), undermines littoral owners' property by diminishing "any expectation that oceanfront owners in Hawai`i had and may have in future accretions to their property." *Id.* The respondents in *Beach Replenishment* made the same argument without success. Brief of Respondent Florida Department of Env. Protection at 48-53.

This is exactly the kind of appropriation by legislative *ipse dixit* the Court condemned in *Webb's* and *Palazzolo*. Whatever obligations the State may have to protect public resources, they do not allow eliminating longstanding riparian ownership of

future accretion merely by giving notice that it desires to protect natural resources. No principle of Hawai`i law supported the notion that private lands and riparian rights can become public at the legislature's whim.

This case does not in any way involve the State merely regulating oceanfront property or implementing any "background principles" of state law, such as the doctrine of avulsion, which was dispositive in *Beach Renourishment*. Through legislation – separate and apart from the conversion of accretion to "public lands" – the State of Hawai`i has restricted development of accreted land by placing it in the conservation district (H.R.S. § 501-33), imposing setbacks to conserve open space (H.R.S. § 205A-2), and restricting potential development (*see* H.R.S. § 183-45, which prohibits structures, dredging, grading and other use "which . . . may interfere with the future natural course of the beach"). Petitioners have never complained about those restrictions; they are only seeking to halt the outright appropriation effected by Act 73.

B. The Hawai`i Court Has Done What *Lovingston* And *Beach Renourishment* Forbid: Denying Compensation Through An Unfounded Disregard Of Established State Law

Whether viewed through the plurality's lens of the takings clause or Justice Kennedy's view of the due process clause, the Hawai`i court has done

exactly what *Beach Renourishment* forbids. Instead of honoring indisputable incidents of riparian ownership, the Hawai'i court – without any supporting precedent – effectively eliminated the right to an ambulatory boundary and accretion for the purpose of avoiding the duty to pay compensation. In short, the court below effectively eliminated an established property right by dismissing riparianness as too speculative to be worthy of constitutional protection. This is exactly the type of unprincipled judicial denial of established property rights which was condemned in *Beach Renourishment*, albeit under different rationales.[10] Specifically, both the plurality opinion and Justices Kennedy and Sotomayor said that such rights cannot be extinguished without some remedy. 130 S.Ct. at 2602 ("If a legislature *or a court* declares what was once an established right of private property no longer exists, it has taken that property.") (Scalia, J.) (emphasis in original); 130 S.Ct. 2614 (Kennedy, J., concurring).

This case presents the opportunity for the Court – with a full complement of Justices – to resolve the issues relating to the constitutional basis for challenging judicial "takings" that were not resolved in

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[10] The concern expressed by Justice Kennedy (130 S.Ct. at 2616) about the propriety of a federal court requiring a state to "pay owners for takings caused by a judicial decision," is not present here. The requirement for compensation has already been determined by the Hawai'i court (122 Haw. at 57, 222 P.3d at 464). App. at 66. The only question is what "property" the State must pay for.

Beach Renourishment. Regardless which constitutional theory prevails, the Hawai`i decision is inconsistent with this Court's past rulings because a century of riparian rights have been extinguished without compensation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

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MAUNALUA BAY BEACH OHANA 28, a Hawai'i non-profit corporation; MAUNALUA BAY EACH OHANA 29, a Hawai'i non-profit corporation; MAUNALUA BAY BEACH OHANA 38, a Hawai'i non-profit corporation, individually and on behalf of all others similarly situated, Plaintiffs-Appellees, v. STATE OF HAWAI'I, Defendant-Appellant

NO. 28175

APPEAL FROM THE CIRCUIT COURT
OF THE FIRST CIRCUIT
(Civ. No. 05-1-0904)

DECEMBER 30, 2009

WATANABE AND FOLEY, JJ.;
WITH NAKAMURA, C.J., CONCURRING
SEPARATELY AND DISSENTING

OPINION OF THE COURT BY WATANABE, J.

This appeal arises from an inverse-condemnation lawsuit filed by Maunalua Bay Beach Ohana 28, Maunalua Bay Beach Ohana 29, and Maunalua Bay

Beach Ohana 38[1] (collectively, Plaintiffs), on behalf of themselves and all non-governmental owners of oceanfront real property in Hawai'i on and/or after May 19, 2003 (oceanfront, littoral, or riparian owners), challenging the constitutionality of Act 73, 2003 Haw. Sess. Laws at 128 (Act 73). Plaintiffs alleged that Act 73:

> a. Took oceanfront owners' rights to claim accreted land (other than that which restored previously eroded land and that which was the subject of registration or quiet title proceedings on May 20, 2003) and declared all such land to be "state land";

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[1] Plaintiffs are three Hawai'i non-profit corporations that were formed by homeowners in the Portlock area of O'ahu. The oceanfront lots underlying the Portlock homes were originally owned and developed in leasehold by the Trustees of the Estate of Bernice Pauahi Bishop (Bishop Estate). The lease for each oceanfront lot described the lot by specific metes and bounds. The leases did not include a narrow strip of land between the lot and the ocean, which Bishop Estate reserved for itself (beach-reserve lot). In the late 1980's or early 1990's, Bishop Estate sold its fee interest in the oceanfront lots to the Portlock homeowners but reserved its fee interest in the beach-reserve lots. On May 6, 2005, Bishop Estate sold to Plaintiffs the beach-reserve lots that adjoined the lots of Plaintiffs' respective homeowner members. Pursuant to the deeds for the beach-reserve lots, Bishop Estate reserved access and utility easements for itself, together with the right to grant easements over the lots to government agencies and public utilities; Plaintiffs agreed to continue to allow the public to use the beach-reserve lots "for access, customary beach activities and related recreational and community purposes"; and Plaintiffs accepted numerous restrictive covenants that ran with the lots.

> b. Took from oceanfront owners' [sic] their property rights in (1) all accreted oceanfront land which existed on May 20, 2003 and which had not previously been registered or been made the subject of then-pending registration proceedings; and (2) all future accretion which was not proven to be the restored portion of previously accreted land;
>
> c. Damaged oceanfront owners' remaining property by depriving them of ownership of the land abutting the ocean; and
>
> d. Damaged all accreted lands by placing them in the conservation district.

Plaintiffs sought just compensation, blight damages, a declaratory judgment that Act 73 was unenforceable under the Hawai'i State Constitution unless and until Defendant-Appellant State of Hawai'i (State) pays just compensation to Plaintiffs and the class they represented, and an injunction forbidding the State from asserting ownership or control over the affected property and from enforcing Act 73.

On September 1, 2006, the Circuit Court of the First Circuit[2] (circuit court) entered an order granting Plaintiffs' February 13, 2006 amended motion for partial summary judgment (PSJ) on Plaintiffs' claim for declaratory relief. In relevant part, the circuit court declared that

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[2] The Honorable Eden Elizabeth Hifo presided.

> Act 73 . . . represented a sudden change in the common law and effected an uncompensated taking of, and injury to, (a) littoral owners' accreted land, and (b) littoral owners' right to ownership of future accreted land, insofar as Act 73 declared accreted land to be "public land" and prohibited littoral owners from registering existing and future accretion under [Hawaii Revised Statutes (HRS)] Chapter 501 and/or quieting title under [HRS] Chapter 669.

This interlocutory appeal by the State followed.

We vacate that part of the PSJ order which concluded that Act 73 effected an uncompensated taking of and injury to littoral owners' right to ownership of future accreted land and remand this case to the circuit court for further proceedings consistent with this opinion.

THE LEGAL LANDSCAPE

A. Definitions and General Doctrines

In his treatise on real property, Professor Powell notes:

> Where title to real property describes a boundary line as a body of water, the common law has developed several different doctrines that respond to the issues raised by the moveable nature of those bodies of water. Accretion, dereliction (or reliction), erosion and avulsion are ancient common-law doctrines rooted in the Roman law of alluvion

and the civil law doctrine of accession. As applied, these doctrines are as complex and muddy as the movements of the water.

The term "accretion" denotes the process by which an area of land is increased by the gradual deposit of soil due to the action of a boundary river, stream, lake, pond, or tidal waters. The term "dereliction," or its modern counterpart "reliction," denotes the process by which land is exposed by the gradual receding of a body of water. The term "erosion" denotes the process by which land is gradually covered by water. The term "avulsion" denotes the process by which there is a sudden and perceptible change in the location of a body of water.

. . . .

Where the change in location of a body of water is caused by accretion, reliction, or erosion, the boundary line between the abutting landowners moved with the waterway. Thus the riparian or littoral owner is given title to lands that are gradually added by accretion or reliction. In some circumstances, whether the accretion occurs on the banks of a river or stream rather than on the banks of other bodies of water may be critical in determining the ownership of the accreted lands. Similarly, a riparian owner loses title to lands that are submerged through the process of erosion. In contrast, if the boundary river, stream, lake, or tidal water changes its location because of the process of

> avulsion, the boundary line remains the same. In some circumstances, the doctrine of re-emergence[3] will be applied to both accretive and avulsive changes to determine the ownership of certain lands.

Richard M. Powell, 9 *Powell on Real Property* §§ 66.01[1]-66.01[2], at 66-2-66-9 (2006) (footnote added; footnotes omitted).

Some scholars have expressed doubt that the doctrines of accretion, erosion, reliction, and avulsion are actually rules of law, causing a stated result upon the occurrence of stipulated facts, rather than rules of construction used to determine what the grantor of riparian land intended the grantee of the land to receive. *See, e.g.*, 9 *Powell on Real Property* § 66.03[1], at 66-24 (2006); Herbert Thorndike Tiffany, 4 *The Law of Real Property* § 1220 (3d ed. 1975 & 2009-2010 cum. supp.). As Professor Tiffany explains,

> if we recognize a distinct doctrine of accretion, in effect a rule of law that an owner of land shall have whatever adjacent land may be created by the gradual action or change of

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[3] The re-emergence doctrine typically applies to the following fact pattern:

> A owns a riparian parcel while B owns an adjacent upland non-riparian parcel. By the process of erosion all of A's parcel becomes submerged and B's parcel becomes riparian. Under the general rules of erosion, A loses title to his or her parcel. Then, by the process of accretion, A's parcel re-emerges.

9 *Powell on Real Property* § 66.03[1], at 66-25-66-26.

water, the intention of the parties interested in the delimitation of the boundaries of the land is immaterial. In the presence of such a doctrine, the fact that, in conveying the property to its present owner, the grantor expressly retained all future accretions, would be immaterial, as would be the fact that the conveyance, in describing the land, made no reference to the body or stream of water, or to any incident or characteristic thereof. We do not find any case which explicitly decides that one can, in conveying property bounding on water, retain any subsequent accretions thereto, but there are dicta to that effect. The effectiveness of intention in this regard is also indicated by judicial assertions that when the boundary is fixed by the deed at a specified line without reference to the water, the grantee cannot claim accretions beyond such line. . . . The question whether there is a distinct doctrine of accretion, or whether the so-called doctrine is merely a rule for the ascertainment of boundaries on water, appears to be clearly presented by cases involving the right of one, whose nonriparian land has become riparian by the gradual encroachment of the water, to claim land subsequently formed by the accretion of the water. In such a case, the intention of the grantor of the present proprietor, or of some person anterior to him in the chain of title, was to convey land extending only to a boundary away from the water, and consequently if, because his land has become riparian, he is given the benefit of accretions

> thereto, he is in effect given what it was never the intention of his predecessor in title to convey. If there is a rule of law that accretions belong to the riparian proprietor, he is entitled to the accretions, while otherwise he is not so entitled.

4 *The Law of Real Property* § 1220, at 1075-76 (footnotes omitted).

The doctrine of accretion has been rationalized by courts and commentators on various grounds. Professor Powell summarized and critiqued these rationales as follows:

> Under the Roman law of accession, the owner of the cow also owns the calf, the owner of riparian or littoral land owns the accreted land. This rationale has received little support in recent times and is clearly not relevant when either the process of reliction or erosion is occurring.
>
> A second rationale occasionally mentioned by the courts and commentators is the ancient legal maxim of *de minimis non curat lex*. There is a logical connection between the de minimis concept and the requirement for accretion, reliction, and erosion that the change be gradual and imperceptible, but the justification has received little modern support since in many accretion cases substantial and valuable acreage is involved.
>
> Another rationale is tautological. Where the parties have designated a body of water as a boundary line, that body of water

remains the boundary even if it should change its location. This justification may have been derived from the Roman law where there is no distinction made between accretive and avulsive changes. It is inconsistent, however, with the existence of the doctrine of avulsion because the agreed-to water boundary does not move if the change is determined to be sudden and perceptible.

A fourth rationale is alternatively identified as the productivity or efficiency theory. There are two subsets to this justification. The first notes the inefficiency of small slivers of land surrounded by water and unconnected by land with the owner. The second notes that the adjacent owner is in a better position to use the land than the state or the non-adjacent owner. As stated by the Supreme Court: "it is in the interest of the community, that all lands should have an owner, and most convenient that insensible additions to the shore should follow the title to the shore."

A fifth rationale is a compensation or equity theory. The Supreme Court succinctly summarized this justification when it stated:

> Since a riparian owner is subject to losing land by erosion beyond his [or her] control, he [or she] should benefit from any additions to his [or her] lands by the accretions thereto which are equally beyond his [or her] control.

> This rationale has received only modest judicial support and has been criticized as being tautological and based on erroneous assumptions.
>
> The most persuasive and fundamental rationale for a doctrine that permits a boundary to follow the changing location of a body of water is the desirability of maintaining land as riparian that was riparian under earlier conditions, thus assuring the upland owners of access to the water along with the other advantages of such contiguity. A subset of the access to water rationale is the expectancy argument. One who purchases riparian land expects that the land will retain its riparian character even if the body of water moves. An essential attribute of a riparian or littoral parcel is its access to water, so when such a parcel was created or transferred the parties must have intended the transferee to retain that access.

9 *Powell on Real Property* § 66.01[3], at 66-9-66-13.

B. Hawai'i Supreme Court Precedent

The supreme court of the Kingdom of Hawai'i first addressed the ownership of accreted lands in *Halstead v. Gay,* 7 Haw. 587 (1889), a case in which the plaintiff sought damages from the defendant for trespassing on land seaward of the boundary of the plaintiff's oceanfront property, as described in the plaintiff's deed. According to the deed, the property's seaside boundary was "ma kahakai a hiki i ka hope o

ka holo mua ana," without distance given. The supreme court explained that "kaha" means "scratch, or mark," "'[k]ai means the sea, or salt water," and as described in the survey, "[k]ahakai . . . means the mark of the sea, the junction or edge of the sea and land." *Id.* at 589. The supreme court translated "[a] hiki i kahakai" as "reaching to high water mark" and "ma kahakai a hiki i ka hope o ka holo mua ana" as "along the high water mark to the end of the first course," *id.*, and held, based on this description, that it was "clear" that "[t]he intention is . . . to grant to the sea, and make it coterminous with it." *Id.* The supreme court then observed:

> In this kingdom the average rise and fall of the tide is two feet. Where the coast is of rock, high and low water are on the same line. Where it is of sand, the difference between high and low water is generally too little and too ill-defined and shifting to be taken into account.
>
> Section 387 of the Code, page 92 Compiled Laws,[4] seems to imply that the

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[4] Section 387 of the Compiled Laws of the Hawaiian Kingdom provided:

> The fishing grounds from the reefs, and where there happen to be no reefs, from the distance of one geographical mile seaward to the beach at low water mark, shall, in law, be considered the private property of the konohikis, whose lands, by ancient regulation, belong to the same; in the possession of which private fisheries, the said konohikis shall not be molested,

(Continued on following page)

> proprietorship of land adjacent to the beach extended to low water mark, for it enacts that the fisheries for a mile from low water mark are the property of the owners of the lands adjacent and appurtenant, thus making the boundary between the land and the fishery to be the low water line.
>
> But *whether some land between present high and low water has been trespassed upon is not the question in this case, but it is whether land now above high-water mark, which has been formed by imperceptible accretion against the shore line existing at the date of the survey and grant, has become attached by the law of accretion to the land described in the grant. By the definitions we have given, it follows that the plaintiff has the rights of a littoral proprietor, and that the accretion is his.*

Id. at 589-90 (emphasis and footnote added).

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except to the extent of the reservations and prohibitions hereinafter set forth.

1884 Compiled Laws of the Hawaiian Kingdom § 387, at 92-93. A "konohiki" is the "[h]eadman of an *ahupua'a* land division under the chief; land or fishing rights under control of the *konohiki*; such rights are sometimes called *konohiki* rights." Mary K. Pukui and Samuel H. Elbert, *Hawaiian Dictionary* 166 (1986). An "ahupua'a" is a "[l]and division usually extending from the uplands to the sea, so called because the boundary was marked by a heap (*ahu*) of stones surmounted by an image of a pig (*pua'a*), or because a pig or other tribute was laid on the alter as tax to the chief." *Id.* at 9.

In *In re Ashford*, 50 Haw. 314, 440 P.2d 76 (1968), the petitioners sought to register title to two parcels of land on the island of Moloka'i, which were described in the royal patents as running "ma ke kai" (along the sea). The petitioners claimed that "the phrase describes the boundaries at mean high water which is represented by the contour traced by the intersection of the shore and the horizontal plane of mean high water based on the publications of the U.S. Coast and Geodetic Survey." *Id.* at 314-15, 440 P.2d at 77. The State claimed "that 'ma ke kai' is the high water mark that is along the edge of vegetation or the line of debris left by the wash of waves during ordinary high tide[,]" or "approximately 20 to 30 feet above the line claimed by the [petitioners]." *Id.* at 315, 440 P.2d at 77 (footnote omitted). The Hawai'i Supreme Court, in a 4-1 decision, held:

> *We are of the opinion that 'ma ke kai' is along the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves,* and that the trial court erred in finding that it is the intersection of the shore with the horizontal plane of mean high water.
>
> . . . .
>
> When the royal patents were issued in 1866 by King Kamehameha V, the sovereign, not having any knowledge of the data contained in the publications of the U.S. Coast and Geodetic Survey, did not intend to and did not grant title to the land along the ocean boundary as claimed by the [petitioners].

Hawaii's land laws are unique in that they are based on ancient tradition, custom, practice and usage. The method of locating the seaward boundaries was by reputation evidence from kamaainas[5] and by the custom and practice of the government's survey office. It is not solely a question for a modern-day surveyor to determine boundaries in a manner completely oblivious to the knowledge and intention of the king and old-time kamaainas who knew the history and names of various lands and the monuments thereof.

In this jurisdiction, it has long been the rule, based on necessity, to allow reputation evidence by kamaaina witnesses in land disputes. The rule has a historical basis unique to Hawaiian land law. It was the custom of the ancient Hawaiians to name each division of land and the boundaries of each division were known to the people living thereon or in the neighborhood. 'Some persons were specially taught and made repositories of this knowledge, and it was carefully delivered from father to son.' With the Great Mahele in 1848, these kamaainas, who knew and lived in the area, went on the land with the government surveyors and pointed out the boundaries to the various divisions of land. In land disputes following the Great Mahele, the early opinions of this court show that the

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[5] A "kama'aina" is defined as "[n]ative-born, one born in a place, host[.]" *Hawaiian Dictionary* at 124.

> testimony of kamaaina witnesses were permitted into evidence. In some cases, the outcome of decisions turned on such testimony.
>
> Two kamaaina witnesses, living in the area of [petitioners'] land, testified, over [petitioners'] objections, that according to ancient tradition, custom and usage, the location of a public and private boundary dividing private land and public beaches was along the upper reaches of the waves as represented by the edge of vegetation or the line of debris. In ancient Hawaii, the line of growth of a certain kind of tree, herb or grass sometimes made up a boundary.
>
> Cases cited from other jurisdictions cannot be used in determining the intention of the King in 1866.

Id. at 316-17, 440 P.2d at 77-78 (footnote added; citations and footnotes omitted).

Five years later, the Hawai'i Supreme Court further developed the rule pronounced in *Ashford* in an eminent-domain case initiated by the County of Hawai'i to acquire a park site. *County of Hawaii v. Sotomura,* 55 Haw. 176, 517 P.2d 57 (1973). In *Sotomura,* unlike in *Ashford,* the seaward boundary of the property at issue had been registered with the land court in 1962. The defendant property owners argued that "because land court proceedings are res judicata and conclusive against all persons as to the boundary determination, the certificate of registration [with the land court] shall be conclusive evidence

of the location of the seaward boundary[,]" even if the seaward boundary had subsequently eroded. *Id.* at 178, 517 P.2d at 60. The supreme court disagreed with the property owners and held

> that registered ocean front property is subject to the same burdens and incidents as unregistered land, including erosion. HRS § 501-81. Thus the determination of the land court that the seaward boundary of Lot 3 is to be located along the high water mark remains conclusive; however, the precise location of the high water mark on the ground is subject to change and may always be altered by erosion.

Id. at 181, 517 P.2d at 61. The supreme court then said:

> Having concluded that the trial court properly determined that the seaward boundary had been altered by erosion and the location of the high water mark has shifted, we now hold that the new location of the seaward boundary on the ground, as a matter of law, is to be determined by our decision in *In re Application of Ashford, supra.*
>
> The *Ashford* decision was a judicial recognition of long-standing public use of Hawaii's beaches to an easily recognizable boundary that has ripened into a customary right. Public policy, as interpreted by this court, favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible.

> The trial court correctly determined that the seaward boundary lies along "the upper reaches of the wash of waves." However, the court erred in locating the boundary along the debris line, rather than along the vegetation line.
>
> We hold as a matter of law that where the wash of the waves is marked by both a debris line and a vegetation line lying further mauka; the presumption is that the upper reaches of the wash of the waves over the course of a year lies along the line marking the edge of vegetation growth. The upper reaches of the wash of the waves at high tide during one season of the year may be further mauka than the upper reaches of the wash of the waves at high tide during the other seasons. Thus while the debris line may change from day to day or from season to season, the vegetation line is a more permanent monument, its growth limited by the year's highest wash of the waves.

Id. at 182, 517 P.2d at 61-62 (citation and footnote omitted). The supreme court then turned its attention to the question of whether title to land lost by erosion passes to the State and stated:

> In the absence of kamaaina testimony or other evidence of Hawaiian custom relevant to the question, we resort to common law principles:
>
> > The loss of lands by the permanent encroachment of the waters is one of

> the hazards incident to littoral or riparian ownership. . . . [W]hen the sea, lake or navigable stream gradually and imperceptibly encroaches upon the land, the loss falls upon the owner, and the land thus lost by erosion returns to the ownership of the state. *In re City of Buffalo,* 206 N.Y. 319, 325, 99 N.E. 850, 852 (1912).

We find another line of cases persuasive to determine this question. Land below the high water mark, like flowing water, is a natural resource owned by the state, "subject to, but in some sense in trust for, the enjoyment of certain public rights." *Bishop v. Mahiko,* 35 Haw. 608, 647 (1940). The public trust doctrine, as this theory is commonly known, was adopted by this court in *King v. Oahu Railway & Land Co.,* 11 Haw. 717 (1899). In that case we adopted the reasoning of the United States Supreme Court in *Illinois Central R.R. v. Illinois,* 146 U.S. 387 (1892), holding that title to land below the high water mark was:

> . . . different in character from that which the state holds in lands intended for sale. . . . It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private

> parties. . . . The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. *King v. Oahu Railway & Land Co.*, 11 Haw. at 723-24.
>
> We hold that the land below the *Ashford* seaward boundary line as to be redetermined belongs to the State of Hawaii, and the defendants should not be compensated therefor.

Id. at 183-84, 517 P.2d at 62-63 (brackets and ellipses in original).

In *In re Sanborn*, 57 Haw. 585, 562 P.2d 771 (1977), the appellees had sought approval from the County of Kaua'i (Kaua'i) to subdivide a beachfront lot into two smaller lots. Pursuant to the then-recently enacted state-shoreline-setback act, HRS §§ 205-31 through 205-37 (Supp. 1975), the appellees were required to submit to the Kaua'i planning department a map of their property, certified partly by the state land surveyor (state surveyor). When the state surveyor refused to certify the map prepared by the appellees, they sued. *Id.* at 587, 562 P.2d at 772. The land court recognized that the vegetation and debris line drawn on a map of the appellees' property represented "the 'upper reaches of the wash of waves' during ordinary high tide during the winter season,

when the . . . waves are further mauka (or inland) than the highest wash of waves during the summer season." *Id.* at 588, 562 P.2d at 773. However, the land court denied legal significance to the vegetation and debris line, determining instead that the appellees' "beachfront title is fixed by certain distances and azimuths set out in the 1951 land court decree of registering title to the property." *Id.* at 589, 562 P.2d at 774. When these distances and azimuths were plotted on a map of the appellees' property, "they gave a line approximately 40 to 45 feet makai (seaward) of the 'vegetation and debris line'." *Id.*, 562 P.2d at 774. On appeal by the state surveyor, the Hawai'i Supreme Court held:

> It is undisputed that during the course of the year actual high water mark varies, with ordinary winter tides reaching substantially further mauka than ordinary summer tides, primarily due to the washing out of beach sands during the winter months. However it is also undisputed that, because of the annual return of sands during the summer months, there has been no substantial *permanent* erosion of the [appellees'] beach since 1951.
>
> The court below held that, because there has been no permanent erosion since 1951, the State is bound by the measurements in the 1951 decree. We reverse. We hold that, regardless of whether or not there has been permanent erosion, the [appellees'] beachfront title boundary is the upper reaches of

> the wash of waves. Although we find that the State is bound by the 1951 decree to the extent that the decree fixes the [appellees'] title line as being "along the high water mark at seashore", we also find that the specific distances and azimuths given for high water mark in 1951 are not conclusive, but are merely prima facie descriptions of high water mark, presumed accurate until proved otherwise. The evidence adduced at trial below established that the 1951 measurements do not reflect (and given the lack of permanent erosion, probably never reflected) the upper reaches of the wash of waves. Rather, the trial court made the finding of fact that the "vegetation and debris line" represents the upper reaches of the wash of waves. Such finding was not clearly erroneous. Accordingly, the "vegetation and debris line" represents the [appellees'] beachfront title line.

Id. at 589-91, 562 P.2d at 774-75. The supreme court then addressed the appellees' contention that HRS § 501-71 gave binding effect to the specific distances and azimuths set out in the 1951 decree for the line of high water. HRS § 501-71 provided then, as it does currently, in relevant part, as follows:

> Every decree of registration of absolute title shall bind the land, and quiet the title thereto, subject only to the exceptions stated in section 501-82. It shall be conclusive upon and against all persons, including the State[.]

Id. at 591, 562 P.2d at 775; HRS § 501-71 (2006). The supreme court stated that although the foregoing

statute literally "states in general terms that a land court decree of registration shall bind the land and be conclusive[,]" "[t]he section does not say that every aspect of a land court decree is always conclusive." *Id.,* 562 P.2d at 775. The supreme court explained that

> [t]he underlying purpose of land court registration under the Torrens system is to afford certainty of title, but it is unrealistic to afford absolute certainty. Our statute explicitly states certain exceptions to the conclusiveness of land court decrees, both in HRS § 501-82 and in HRS § 501-71. . . . Such stated exceptions are not necessarily the sole limitations upon a Torrens decree of registration.
>
> . . . .
>
> In Hawaii, the public trust doctrine, recognized in our case law prior to the enactment of our land court statute, can similarly be deemed to create an exception to our land court statute, thus invalidating any purported registration of land below high water mark. Although the instant case is decided on narrower grounds, *infra,* we approve this court's analysis in *Sotomura, supra,* 55 Haw. at 183-84, 517 P.2d at 63, where it is stated, with reference to land courted property, that land below high water mark is held in public trust by the State, whose ownership may not be relinquished, except where relinquishment is consistent with certain public purposes. Under this analysis, any purported

> registration below the upper reaches of the wash of waves in favor of the appellees was ineffective.
>
> . . . .
>
> In *McCandless v. Du Roi,* 23 Haw. 51 (1915), this court stated that land court decrees are subject to the same rules of construction generally applicable to deeds and that therefore, in construing a land court decree, "'course and distance will yield to known visible and definite objects whether natural or artificial.'" 23 Haw. at 54.
>
> . . . .
>
> We follow *McCandless,* finding that in the 1951 decree the natural monument "along high water mark" controls over the specific distances and azimuths. We further find that the true line of high water in this jurisdiction is along the upper reaches of the wash of waves, as discussed in *In re Application of Ashford,* and *Sotomura, supra.*

Id. at 591-96, 562 P.2d at 775-77 (footnotes and some citations omitted). The supreme court then turned its attention to the appellees' contention that "both the Hawaii and federal constitutions would be violated if this court fixes [their] title line along the upper reaches of the wash of waves" because "such an adjudication would be a taking of private property for public use without just compensation." *Id.,* 562 P.2d at 777-78. The supreme court held as follows:

> Under our interpretation of the 1951 decree, we see no constitutional infirmity. The 1951 decree recognized that the [appellees'] title extends to a line "along high water mark". We affirm the holding in *McCandless, supra,* that distances and azimuths in a land court decree are not conclusive in fixing a title line on a body of water, where the line is also described in general terms as running along the body of water.
>
> . . . .
>
> The absence of a clear legal standard in 1951 tends to disprove the existence of a reasonable expectation in 1951 that the land court would be able to fix conclusively the distances and azimuths of high water. Moreover, as of 1951 the *McCandless* decision had been standing undisturbed for over 35 years. It would have been unreasonable for the parties to rely on specific distances and azimuths after *McCandless* had held that such measurements are inconclusive.

Id. at 597, 562 P.2d at 778.

In *State v. Zimring,* 58 Haw. 106, 566 P.2d 725 (1977), the State sought to quiet title in itself as against the Zimrings and their predecessors-in-interest to approximately 7.9 acres of new land that had been added to the Zimrings' shoreline property by the Puna volcanic eruption of 1955 (lava extension). The Zimrings' deed described the oceanfront boundary of their property as being "along high water mark[.]" *Id.* at 108, 566 P.2d at 728. The Hawai'i

Supreme Court initially observed that historically, "the people of Hawaii are the original owners of all Hawaiian land." *Id.* at 111, 566 P.2d at 729. However, bowing to pressure exerted by foreign residents who sought fee title to land, "King Kamehameha III undertook a reformation of the traditional system of land tenure by instituting a regime of private title in the 1840's" which necessarily diminished the lands in the public domain. *Id.*, 566 P.2d at 729. The supreme court stated:

> This encapsulation of the original and development of the private title in Hawaii makes clear the validity of the basic proposition in Hawaiian property law that land in its original state is public land and if not awarded or granted, such land remains in the public domain. To establish legally cognizable private title to land in the great majority of cases, one must show that he or a predecessor-in-interest acquired a Land Commission Award, a Royal Patent, a Kamehameha Deed, a Grant, a Royal Patent Grant, or other government grant for the land in question. Such award for grant can be demonstrated by either the document itself or through the application of the "presumption of a lost grant."
>
> Aside from acquisition of documented title, one can also show acquisition of private ownership through operation of common law or as established by pre-1892 Hawaiian usage pursuant to HRS § 1-1. . . .

> Therefore, we find the State's position that all land not awarded or granted remains public land to be basically correct. We would only add that transfer to private ownership can also be shown through the operation of common law or as established by pre-1892 Hawaiian usage.

Id. at 114-15, 566 P.2d at 731. The supreme court held that there was a paucity of evidence adduced that "Hawaii usage prior to 1892 gave to the owner of the land along the seashore, title to land created by volcanic eruption when the eruption destroyed the pre-existing seashore boundary and formed a new boundary along the sea[.]" *Id.* at 118, 566 P.2d at 733. The supreme court also disagreed with the Zimrings that "the common law on accretion and avulsion in other states is not directly on point" and held that

> [a]s known at common law, "the term 'accretion' denotes the process by which the area of owned land is increased by the gradual deposit of soil due to the action of a bounding river, stream, lake, pond, or tidal waters." 7 R. Powell, Real Property (1976) ¶ 983. When accretion is found, the owner of the contiguous land takes title to the accreted land. Professor Powell indicates that the "basic justification for a doctrine which permits a boundary to follow the changing stream bank is the desirability of keeping land riparian which was riparian under earlier facts, thus assuring the upland owners access to the water and the advantages of this contiguity." *Id.*

While the accretion doctrine is founded on the public policy that littoral access should be preserved where possible, the law in other jurisdictions makes it clear that the preservation of littoral access is not sacrosanct and must sometimes defer to other interests and considerations. For example, it is well established in California "that accretions formed gradually and imperceptibly, but caused entirely by artificial means . . . belong to the state or its grantee, and do not belong to the upland owner. In California it is also well settled that being cut off from contact with the sea is not basis for proper complaint.

. . . .

Likewise, in cases where there have been rapid, easily perceived and sometimes violent shifts of land (avulsion) incident to floods, storms, or channel breakthroughs, preexisting legal foundations are retained notwithstanding the fact that former riparian owners may have lost their access to the water.

In determining in whom lava extensions should vest, we are guided by equitable principles and must balance between competing interests. On the one hand, there is the interest of the former littoral owner seeking to regain access to the ocean. On the other hand is the interest of the public at large, the original and ultimate owner of all Hawaiian land.

Certainly, a grant of the lava extension to the former littoral owner would compensate him [or her] for the loss of the beach-frontage character of his [or her] property. However, it is the windfall of the added acreage which such owner would also be afforded which this court finds troublesome. If a one-third acre parcel fronting the ocean is flowed over by lava which adds one or two seaward acres to the parcel, is it equitable that its owner acquire property which is three or six times the size of the preexisting parcel? If a littoral owner is to be thus compensated for lava devastation, should not an upland pasture or farm owner be also compensated with pasture or farm land for the destruction of what had been the chief economic attribute of the parcel?

It is impossible for any court to fashion a legal doctrine which will equitably compensate all victims of lava devastation. This court believes that it is within the province of the legislature to determine the nature and extent of compensation for such natural disasters.

Rather than allowing only a few of the many lava victims the windfall of lava extensions, this court believes that equity and sound public policy demand that such land inure to the benefit of all the people of Hawaii, in whose behalf the government acts as trustee. Given the paucity of land in our island state and the concentration of private ownership in relatively few citizens, a policy

> enriching only a few would be unwise. Thus we hold that lava extensions vest when created in the people of Hawaii, held in public trust by the government for the benefit, use and enjoyment of all the people.
>
> Under public trust principles, the State as trustee has the duty to protect and maintain the trust property and regulate its use. Presumptively, this duty is to be implemented by devoting the land to actual public uses, *e.g.*, recreation. Sale of the property would be permissible only where the sale promotes a valid public purpose.
>
> While the Zimrings cannot be granted the private beachfront title which they seek, they, as members of the public, would share in public access to the lava extension and to the ocean, unless the interest in allowing public access is outweighed by some other public interest, or unless the land is sold in furtherance of the public interest.

Id. at 120-21, 566 P.2d at 734-35 (emphasis added; some ellipses in original; citations and footnotes omitted).

In *In re Application of Banning*, 73 Haw. 297, 832 P.2d 724 (1992), the Trustees of Kalama Community Trust (Trustees) filed a petition with the land court pursuant to HRS § 501-33[6] to register title to

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[6] The supreme court noted in *Banning* that HRS § 501-33 required that

(Continued on following page)

approximately 0.251 acres of "accreted" land fronting their Kailua shoreline property and joined and served all neighboring landowners. A neighboring landowner and the State asserted that registration should be denied because the alleged "accretion" to the Trustees' property "was not natural and permanent." *Id.* at 302, 832 P.2d at 727. The land court found that the "accreted" land was permanent and natural but that it had been used by the general public for recreation and access to the beach for at least twenty years, with the acquiescence of the Trustees, and had therefore been impliedly dedicated to the general public. *Id.*, 832 P.2d at 727-28. On appeal, the supreme court reversed the land court's finding of implied dedication to the general public. In doing so, the supreme court initially observed:

> "Land now above the high water mark, which has been formed by imperceptible accretion against the shore line of a grant, has become attached by the law of accretion to the land described in the grant and belongs to the littoral proprietor." ***Halstead v. Gray***, 7 Haw. 587 (1889). "[T]he accretion doctrine is founded on the public policy that littoral access should be preserved where

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> [a]n applicant for registration of land by accretion shall ***prove by a preponderance of the evidence that the accretion is natural and permanent. "Permanent" means that the accretion has been in existence for at least twenty years.***

Id., 832 P.2d at 727 (bolded emphasis and brackets in original).

possible. . . ." ***State v. Zimring***, 58 Haw. 106, 119, 566 P.2d 725, 734 (1977).

> [Other] reasons ordinarily given for th[is] general rule as to accretions are . . . that the loss or gain is so imperceptible that it is impossible to identify and follow the soil lost or to prove where it came from, that small portions of land between upland and water should not be allowed to lie idle and ownerless, or that, since the riparian owner may lose soil by the action of the water, he should have the benefit of any land gained by the same action.

65 C.J.S. ***Navigable Waters*** § 82(1), at 256 (1966) (footnotes omitted).

Id. at 303-04, 832 P.2d at 728 (brackets and ellipsis in original). The supreme court also stated:

> We have acknowledged in ***Hawaii County v. Sotomura***, 55 Haw. 176, 517 P.2d 57 (1973), ***cert. denied***, 419 U.S. 872 (1974), that public policy "favors extending to public use and ownership as much of Hawaii's shoreline as is ***reasonably*** possible." ***Id.*** at 182, 517 P.2d at 61-62 (emphasis added). This interest must be balanced against the littoral landowner's right to the enjoyment of his land.
>
> Under the facts of this case, public access to the beach can be preserved without

> infringing on the enjoyment of the littoral landowner in his accreted land.

Id. at 309-10, 832 P.2d at 731.

More recently, in *Diamond v. State,* 112 Hawai'i 161, 145 P.3d 704 (2006), the supreme court was called upon to determine the proper location of the shoreline under HRS chapter 205A, the Coastal Zone Management Act (CZMA). Pursuant to HRS § 205A-1 (2001), "[s]horeline" is defined as the "upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetarian growth, or the upper limit of debris left by the wash of the waves." This definition is thus equivalent to the Hawai'i Supreme Court's delineation of the boundary dividing private land from public beaches that was adopted in *Ashford.* Under the CZMA, the state board of land and natural resources (BLNR) is responsible for certifying the shoreline of an oceanfront property for building-setback purposes. HRS § 205A-42 (2001). A certified shoreline, which is valid for twelve months, HRS § 205A-42(a), is the baseline that is used to (1) measure the shoreline setback line, defined as "that line established in this part [III[7]] or by the county running inland from the shoreline at a

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[7] HRS § 205A-43(a) (2001) provides in part that "[s]etbacks along shorelines are established of not less than twenty feet and not more than forty feet inland from the shoreline."

horizontal plane," HRS § 205A-41 (2001) (footnote added); and (2) determine the "shoreline area," which encompasses "all of the land area between the shoreline and the shoreline setback line," HRS § 205A-41, where structures and certain activities are prohibited by statute. *See* HRS § 205A-44 (2001).

In *Diamond,* an oceanfront property owner hired a contractor to cut the trees on the owner's property, hired a landscaper to plant salt-tolerant vegetation in the shoreline area of the property, and installed an irrigation line to water the newly planted vegetation. *Id.* at 164, 145 P.3d at 707. In certifying the property's shoreline, the BLNR used the "stable vegetation line" – the line where plants, "without continued human intervention, are well-established and would not be uprooted, broken off, or unable to survive occasional wash or run-up of waves" – even though the vegetation had originally been induced by human hands and the debris line representing the upper wash of the waves occur[red] mauka (inward) of the vegetation line. *Id.* at 168, 145 P.3d at 711.

The Hawai'i Supreme Court held that based on the plain and obvious meaning of the statute, the statute's legislative history, and relevant case law, the shoreline should be certified at the "highest reach of the highest wash of the waves," *id.* at 172-73, 145 P.3d at 715-16, and BLNR therefore erred in certifying the shoreline based on a per se rule establishing the primacy of a vegetation line, which is a more permanent monument, over the debris line. *Id.* at 174-75, 145 P.3d at 717-18. The supreme court noted

that its *Sotomura* decision "clearly favored the public policy of extending 'as much of Hawaii's shoreline as is reasonably possible' to public ownership and use" and, therefore, the vegetation line cannot trump the debris line if the debris line is mauka of the vegetation line. *Id.* at 175, 145 P.3d at 718. The supreme court also rejected the use of artificially planted vegetation to determine the certified shoreline, stating:

> The utilization of artificially planted vegetation in determining the certified shoreline encourages private land owners to plant and promote salt-tolerant vegetation to extend their land further makai, which is contrary to the objectives and policies of HRS chapter 205A as well as the public policy we set forth in *Sotomura*. Merely because artificially planted vegetation survives more than one year does not deem it "naturally rooted and growing" such that it can be utilized to determine the shoreline. We therefore reconfirm the public policy set forth in *Sotomura* and HRS chapter 205A and reject attempts by landowners to evade this policy by artificial extensions of the vegetation lines on their properties.

Id. at 175-76, 145 P.3d at 718-19.

In summary, under Hawai'i Supreme Court precedent, (1) the "highest reach of the highest wash of the waves" delineates the boundary between private oceanfront property and public property for ownership purposes, as well as the baseline for measuring

the shoreline setback line and determining the shoreline area, the so-called no-building zone, notwithstanding that the deed for the oceanfront property describes the property by "certain distances and azimuths" that put the seaward boundary of the property below the high-water mark, *In re Sanborn*, 57 Haw. at 589, 562 P.2d at 774; (2) land added to oceanfront property through avulsive lava extension belongs to the State; and (3) land added to oceanfront property through accretion belongs to the oceanfront property owner.

C. The Statutory Landscape

1. Act 221, 1985 Haw. Sess. Laws at 401 (Act 221)

In 1985, the Hawai'i State Legislature passed House Bill No. 194, entitled "A Bill for an Act Relating to Accretion[,]" which was signed into law by the Governor as Act 221 on June 4, 1985. Act 221 provided, in relevant part, as follows:

> SECTION 1. Chapter 183, [HRS], is amended by adding a new section to be appropriately designated and to read as follows:
>
> "§ **183-45 Accreted land.** No structure, retaining wall, dredging, grading, or other use which interferes or may interfere with the future natural course of the beach, including further accretion or erosion, shall be permitted to accreted land as judicially decreed under section 501-33 or 669-1(e).

This provision shall not in any way be construed to affect state or county property.

Any structure or action in violation of this provision shall be immediately removed or stopped and the property owner shall be fined in accordance with section 183-41(e). Any action taken to impose or collect the penalty provided for in this subsection shall be considered a civil action."

SECTION 2. Chapter 501, [HRS], is amended by adding a new section to be designated and to read as follows:

"§ **501-33 Accretion to land.** An applicant for registration of land by accretion shall prove by a preponderance of the evidence that the accretion is natural and permanent. "Permanent" means that the accretion has been in existence at least twenty years. The accreted portion of the land shall be considered within the conservation district unless designated otherwise by the land use commission under chapter 205. Prohibited uses are governed by section 183-45."

SECTION 3. Section 669-1, [HRS], is amended to read as follows:

"§ **669-1 Object of action.** (a) Action may be brought by any person against another person who claims, or who may claim adversely to the plaintiff, an estate or interest in real property, for the purpose of determining the adverse claim.

(b) Action for the purpose of establishing title to a parcel of real property of five acres or less may be brought by any person who has been in adverse possession of the real property for not less than twenty years. Action for the purpose of establishing title to a parcel of real property of greater than five acres may be brought by any person who had been in adverse possession of the real property for not less than twenty years prior to November 7, 1978, or for not less than earlier applicable time periods of adverse possession. For purposes of this section, any person claiming title by adverse possession shall show that such person acted in good faith. Good faith means that, under all the facts and circumstances, a reasonable person would believe that he or she has an interest in title to the lands in question and such belief is based on inheritance, a written instrument of conveyance, or the judgment of a court of competent jurisdiction.

(c) Action brought to claim property of five acres or less on the basis of adverse possession may be asserted in good faith by any person not more than once in twenty years, after November 7, 1978.

(d) Action under subsection (a) or (b) shall be brought in the circuit court of the circuit in which the property is situated.

(e) Action may be brought by any person to quiet title to land by accretion. The person bringing the action shall prove by a

> preponderance of the evidence that the accretion is natural and permanent. "Permanent" means that the accretion has been in existence for at least twenty years. The accreted portion of land shall be considered within the conservation district unless designated otherwise by the land use commission under chapter 205. Prohibited uses are governed by section 183-45."

(New statutory material is underscored.)

The legislative history of Act 221 indicates that one of the primary purposes of the act was "to protect the public's access to and enjoyment of Hawaii's beaches." H. Stand. Comm. Rep. No. 346, in 1985 House Journal, at 1142; S. Stand. Comm. Rep. No. 790, in 1985 Senate Journal, at 1223; S. Stand. Comm. Rep. No. 899, in 1985 Senate Journal, at 1291. The House Committees on Water, Land Use, Development and Hawaiian Affairs (WLUDHA) and Judiciary explained, in pertinent part, as follows:

> Your Committees find that a recent problem has occurred along Hawaii's shoreline in places where there are extreme shifts in sand. In such locations, landowners have constructed seawalls to protect lands created by sand movement. The construction of a seawall often causes ocean currents to move laterally along the seashore. As a result, land adjacent to the lot in which the seawall is constructed begins to erode. This prompts the owner of the eroding land to build a

> second seawall. This sequence repeats itself as the ocean currents move along the beach.
>
> As seawalls are constructed, two problems arise. First, a wide stretch of beach is destroyed. Only rock walls standing next to the water are left in its wake. Second, public access to the shoreline and ocean is inhibited.
>
> This bill protects the public's access to and enjoyment of Hawaii's beaches by adding a new section to Chapter 183, Hawaii Revised Statutes. The section prohibits the construction of structures or seawalls, dredging, or grading, or other use of accreted land to which title has been obtained by judicial decree after the enactment of this bill and which interferes or may interfere with the future natural course of the beach.

H. Stand. Comm. Rep. No. 346, in 1985 House Journal, at 1142-43. Similarly, the Senate Judiciary Committee stated that House Bill No. 194 "will protect public's access to beaches, as well as to provide for the minimal interference with the natural processes of beach accretion and erosion." S. Stand. Comm. Rep. No. 899, in 1985 Senate Journal, at 1291.

Another legislative purpose of Act 221 was to establish a burden of proof and provide clear standards in cases where oceanfront property owners seek to register or quiet title to accreted lands. In this

regard, the House Committees on WLUDHA and Judiciary reported:

> This bill also amends Chapter 501, [HRS], which relates to registration of land registered under the Land Court system, by adding a new section to the chapter. The section states that an application to register accreted lands may be granted only if the applicant proves by a clear[8] preponderance of the evidence that the accretion is natural and permanent. An accretion is deemed to be "permanent" if it has been in existence for more than twenty years.
>
> Similarly, this bill amends Section 669-1, [HRS], which relates to actions to quiet title, by adding a new subsection. The subsection also requires that a person bringing an action to quiet title to accreted land prove by a clear [9] preponderance of the evidence that the accretion is natural and permanent. Again, an accretion is "permanent" if it has been in existence for more than twenty years.
>
> Your Committees do not intend to affect the existing law in regard to ownership of and other rights relating to land created by accretion, and it is the intent of your

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[8] The bill was subsequently amended to delete the word "clear" before the phrase "preponderance of the evidence[.]" S. Stand. Comm. Rep. No. 899, in 1985 Senate Journal, at 1292.

[9] *See* footnote 8.

> Committees that the bill does not affect existing law.

H. Stand. Comm. Rep. No. 346, in 1985 House Journal, at 1142-43 (footnotes added). The Senate Judiciary Committee also explained:

> Problems have arisen along Hawaii's shoreline where the sand movement is extensive. Some beachfront owners have taken advantage of calm years when the vegetation line advances seaward to secure title to the new land. At the present time, courts have no clear standard for determining when accreted land becomes permanent and stable. This bill will remedy the problem.

S. Stand. Comm. Rep. No. 899, in 1985 Senate Journal, at 1291.

Written testimony submitted in support of House Bill No. 194 expressed the need for clearer standards. For example, Dr. Doak C. Cox (Dr. Cox) of the University of Hawai'i Environmental Center testified, in pertinent part:

> HB 194 pertains to the registration and land-use designation of accreted land and to measures that may affect the erosion or further accretion to such land. . . .
>
> Before discussing details of the provisions proposed in the bill we wish to identify the problem in coastal-zone management that it is clearly intended to mitigate, and that it will indeed mitigate to a significant extent.

Natural coastal accretion, and its reciprocal, erosion, are processes whose human significance is restricted in Hawaii mainly to beaches. Particularly on open coasts, beaches are geomorphologically unstable features, being subject to extension and/or retreat on time scales ranging from seconds to durations of purely geological interest. By principles of common law applicable in Hawaii, the owner of land mauka of a beach shoreline loses title to land that is lost by erosion, that is through retreat, and gains title to land that is gained by accretion, that is through extension, at least when the erosion or accretion has persisted for some time.

Annual cycles are particularly marked on many Hawaiian beaches. It would be irrational to allow a land owner to claim ownership to land gained by beach extension during one season that will be lost less than a year later; and the courts generally do not apply to the annual cycles of extension and retreat the legal principles of accretion and erosion. However, many Hawaiian open coastal beaches have a history of not only annual cycles but net progressive retreat, net progressive extension, or successive periods of several decades duration during which there has been net progressive retreat and extension. It is with the implications of these longer term changes that HB 194 is concerned.

The principal problem that would be mitigated by the provisions proposed in the

bill relates to the likelihood that the owner of land to which there has been net accretion over several years may treat the accretion as if permanent, will erect structures on it that will be at risk if there is a subsequent erosion, and will then attempt to save these structures by erecting a sea wall or similar structure along the shore. Such a structure would very likely seriously decrease the chances of subsequent accretion even during a period when such accretion would occur naturally.

The bill would require "proof by clear[10] preponderance of the evidence" that the accretion "has been in existence for at least twenty years" as a condition to the registration of the accreted land by the Land Court.

There are beaches in Hawaii on which net accretion over a period of as long as 20 years has been followed by net erosion over a period of similar duration. Nevertheless, the proposed 20-year criterion for registration is reasonable considering the provision of the bill that would place the accreted land in the Conservation District and the provision prohibiting measures that would affect the natural processes which might result in subsequent erosion or future further accretion.

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[10] As noted earlier, the word "clear" was subsequently deleted from the bill that was enacted as Act 221.

Statement by Dr. Cox on House Bill No. 194, Relating to Accretion for House Committees on WLUDHA and Judiciary, February 8, 1985 (footnote added).

2. *Act 73*

In 2003, the Hawai'i State Legislature passed House Bill No. 192, which was signed into law as Act 73[11] on May 20, 2003, the date Act 73 became

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[11] Act 73 states, in relevant part:

SECTION 1. Section 171-1, [HRS], is amended by adding a new definition to be appropriately inserted and to read as follows:

"<u>"Accreted lands" means lands formed by the gradual accumulation of land on a beach or shore along the ocean by the action of natural forces.</u>"

SECTION 2. Section 171-2, [HRS], is amended to read as follows:

"**§ 171-2 Definition of public lands.** "Public lands" means all lands or interest therein in the State classed as government or crown lands previous to August 15, 1895, or acquired or reserved by the government upon or subsequent to that date by purchase, exchange, escheat, or the exercise of the right of eminent domain, or in any other manner; including <u>accreted lands not otherwise awarded</u>, submerged lands, and lands beneath tidal waters which are suitable for reclamation, together with reclaimed lands which have been given the status of public lands under this chapter, except. . . ."

SECTION 3. Section 343-3, [HRS], is amended by amending subsection (c) to read as follows:

"(c) The office [of environmental quality control] shall inform the public of:

(Continued on following page)

. . . .

(4) An application for the registration of land by accretion pursuant to section 501-33 or 669-1(e) for any land accreted along the ocean."

SECTION 4. Section 501-33, [HRS], is amended to read as follows:

"**§ 501-33 Accretion to land.** An applicant for registration of land by accretion shall prove by a preponderance of the evidence that the accretion is natural and permanent[.]; provided that no applicant other than the State shall register land accreted along the ocean, except that a private property owner whose eroded land has been restored by accretion may file an accretion claim to regain title to the restored portion. The applicant shall supply the office of environmental quality control with notice of the application, for publication in the office's periodic bulletin in compliance with section 343-3(c)(4). The application shall not be approved unless the office of environmental quality control has published notice in the office's periodic bulletin.

[~~"Permanent"~~] As used in this section, "permanent" means that the accretion has been in existence *for* at least twenty years. The accreted portion of the land shall be state land except as otherwise provided in this section and shall be considered within the conservation district [~~unless designated otherwise by the land use commission under chapter 205~~]. Prohibited uses are governed by section 183-45."

SECTION 5. Section 669-1, [HRS], is amended by amending subsection (e) to read as follows:

"(e) Action may be brought by any person to quiet title to land by accretion[.]; provided that no action shall be brought by any person other than the State to quiet title to land accreted along the ocean, except that a private property owner whose eroded

(Continued on following page)

effective. Act 73 amended HRS §§ 501-33 and 669-1(e) to provide that owners of oceanfront lands could no longer register or quiet title to accreted lands unless

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land has been restored by accretion may also bring such an action for the restored portion. The person bringing the action shall prove by a preponderance of the evidence that the accretion is natural and permanent. The person bringing the action shall supply the office of environmental quality control with notice of the action for publication in the office's periodic bulletin in compliance with section 343-3(c)(4). The quiet title action shall not be decided by the court unless the office of environmental quality control has properly published notice of the action in the office's periodic bulletin.

[~~"Permanent"~~] As used in this section, "permanent" means that the accretion has been in existence for at least twenty years. The accreted portion of land shall be state land except as otherwise provided in this section and shall be considered within the conservation district [~~unless designated otherwise by the land use commission under chapter 205~~]. Prohibited uses are governed by section 183-45."

SECTION 6. Applications for the registration of land by accretion and actions to quiet title to land by accretion pending at the time of the effective date of this Act shall be processed under the law existing at the time the applications and actions were filed with the court. Applications for the registration of land by accretion and actions to quiet title to land by accretion filed subsequent to the effective date of this Act shall be processed in accordance with this Act.

SECTION 7. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

2003 Haw. Sess. Laws Act 73, at 128-30.

the accretion restored previously eroded land. Act 73 also amended HRS §§ 171-2, 501-33, and 669-1 to provide that, henceforth, accreted lands not otherwise awarded shall be considered "[p]ublic lands" or "state land."

The conference committee considering House Bill No. 192 indicated that

> [t]he purpose of this bill is to protect public beach land by:
>
> (1) Including accreted lands, that is lands formed by the gradual accumulation of land on a beach or shore along the ocean by the action of nature forces, in the definition of state public lands;
>
> (2) Providing that no applicant other than the State shall register accreted lands, with the exception of certain private property owners;
>
> (3) Allowing a private property owner to file an accretion claim to regain title to and register the owner's eroded land that has been restored by accretion; and
>
> (4) Requiring the agency receiving the accretion application to supply the Office of Environmental Quality Control (OEQC) with a notice for publication in the OEQC's periodic bulletin.

Conf. Comm. Rep. No. 2, in 2003 House Journal, at 1700, 2003 Senate Journal, at 945. The Senate Committee on Judiciary and Hawaiian Affairs found that

> this measure will stop the unlawful taking of public beach land under the guise of fulfilling a nonexistent littoral right supposedly belonging to shorefront property owners. The measure will help Hawaii's public lands and fragile beaches by ensuring that coastal property owners do not inappropriately claim newly deposited lands makai of their property as their own.

S. Stand. Comm. Rep. No. 1224, in 2003 Senate Journal, at 1546. The House Committee on Judiciary similarly found "it crucial to protect public beaches from being transformed into private lands through the filing of accretion claims, except to restore to private ownership portions of private land removed by erosion." H. Stand. Comm. Rep. No. 626, in 2003 House Journal, at 1360.

PROCEDURAL HISTORY OF THE UNDERLYING LAWSUIT

On May 19, 2005, one day shy of two years from the date of Act 73's enactment,[12] Plaintiffs filed the underlying complaint in the circuit court.

On December 30, 2005, the circuit court, over the State's objection, entered an order granting Plaintiffs'

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[12] Pursuant to HRS § 661-5 (1993), "[e]very claim against the State, cognizable under this chapter, shall be forever barred unless the action is commenced within two years after the claim first accrues[.]"

October 28, 2005 Amended Motion for Class Certification and certified a class of plaintiffs consisting of "[a]ll non-governmental owners of oceanfront real property in the State of Hawai'i on and/or after May 19, 2003" (Class Certification Order) This order was not certified as final for appeal purposes and is therefore not before us.

On February 13, 2006, Plaintiffs filed an amended motion for PSJ "on their claim for Injunctive Relief, barring enforcement of [Act 73] unless and until the State of Hawai'i acknowledges that it must provide just compensation to the class members and undertakes to do so in conjunction with these proceedings." Plaintiffs claimed that they were "entitled to [PSJ] in their favor . . . because there is no dispute that Act 73 is a taking of private property and no dispute that the State is refusing to pay for such taking. Injunctive Relief is necessary to enjoin the State's unlawful exercise of ownership over private real property rights it refuses to pay for." Plaintiffs argued that their motion should be granted because (1) "[i]t is undisputed that Plaintiffs owned property rights to accretion that the State wrongfully appropriated by its enactment of Act 73;" (2) "[i]t is undisputed that the State has refused to pay for Plaintiffs' accreted property rights;" and (3) "Plaintiffs are entitled to injunctive relief as a matter of law because Plaintiffs must be protected against the State's unconstitutional actions." Plaintiffs argued that

> [o]rdinarily, the remedy for an unconstitutional taking of real property is payment of

> just compensation via an inverse condemnation proceeding. Here, however, the situation is different. Because the legislative scheme did not intend or provide for damages, this Court is able to grant the unique remedy of precluding enforcement of Act 73. Where a legislative act takes a property right without providing for payment of just compensation, injunctive relief is appropriate.

On September 1, 2006, the circuit court entered an order granting Plaintiffs' amended motion for PSJ "insofar as Plaintiffs sought declaratory relief." No injunctive relief was granted. In its order, the circuit court held, in relevant part, as follows:

> Having considered the memoranda filed by the parties, the arguments of counsel, and the records and files in this action, the Court finds that there are no disputed issues of material fact and that [P]laintiffs are entitled to partial summary judgment as a matter of law as follows:
>
> (1) [Act 73] represented a sudden change in the common law and effected an uncompensated taking of, and injury to, (a) littoral owners' accreted land, and (b) littoral owners' right to ownership of future accreted land, insofar as Act 73 declared accreted land to be "public land" and prohibited littoral owners from registering existing and future accretion under [HRS] Chapter 501 and/or quieting title under [HRS] Chapter 669.

(2) [Act 221] was not intended to alter, and did not alter, the common law of Hawai'i with respect to the ownership of accreted land by the littoral owner. Such land belongs to the littoral landowner, whether or not title thereto is registered under [HRS] Chapter 501 or quieted under [HRS] Chapter 669, and it was not taken by the State from littoral landowners so long as the littoral landowners remained free to register title thereto accretion [sic] under [HRS] Chapter 501 or quiet title thereto under [HRS] Stat. Chapter 669.

(3) Land which accreted naturally and imperceptibly before Act 221 was not made "public land," and was not taken from littoral landowners by the State so long as littoral landowners remain free to register title to the accreted land under [HRS] Chapter 501 and/or quiet title under [HRS] Chapter 669;

(4) Land which accreted naturally and imperceptibly after Act 221 is not public land and was not and was not [sic] taken by the State from littoral landowners by Act 73, even if the land is not "permanent" within the meaning of Act 221, so long as littoral landowners remains [sic] free to register title to "permanent" accreted land under [HRS] Chapter 501 and/or quiet title under [HRS] Chapter 669.

> Accordingly, for good cause it is ORDERED that the Amended Motion for Summary Judgment is GRANTED insofar as Plaintiffs sought declaratory relief.

On September 12, 2006, the parties filed their Stipulation for Leave to File Interlocutory Appeal and Order.

On September 27, 2006, the State filed its Notice of Appeal.

DISCUSSION

The dispositive issue in this case is whether the circuit court correctly held that Act 73 "effected an uncompensated taking of, and injury to, (a) littoral owners' accreted land, and (b) littoral owners' right to ownership of future accreted land, insofar as Act 73 declared accreted land to be 'public land' and prohibited littoral owners from registering existing and future accretion under [HRS] Chapter 501 and/or quieting title under [HRS] Chapter 669."

A. Whether Plaintiffs Have Vested Property Rights in Future Accretions

The circuit court concluded that Act 73 "represented a sudden change in the common law and effected an uncompensated taking of littoral owners' right to ownership of future accreted land, insofar as Act 73 declared accreted land to be 'public land' and prohibited littoral owners from registering . . . future

accretion under [HRS] Chapter 501 and/or quieting title under [HRS] Chapter 669."

It is true that under Hawai'i common law, land accreted to oceanfront property belongs to the oceanfront property owner, and under Act 73, all accreted lands (except those which restored eroded lands or were the subject of proceedings pending at the time Act 73 was enacted) now belong to the State. However, pursuant to HRS § 1-1 (1993):

> **Common law of the State; exceptions.** The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, *except as otherwise expressly provided* by the Constitution or laws of the United States, or *by the laws of the State,* or fixed by Hawaiian judicial precedent, or established by Hawaiian usage[.]

(Emphases added.) Furthermore, the Hawai'i Supreme Court has held that "our state legislature may, by legislative act, change or entirely abrogate common law rules through its exercise of the legislative power under the Hawaii State Constitution, but in the exercise of such power, the legislature may not violate a constitutional provision." *Fujioka v. Kam*, 55 Haw. 7, 9, 514 P.2d 568, 570 (1973).

In their underlying complaint, Plaintiffs claimed that Act 73 took their right to future accretions and thereby violated article I, section 20 of the Hawai'i State Constitution, which states: "Private property

shall not be taken or damaged for public use without just compensation." However, any claims that Plaintiffs may have to future accretions are purely speculative, and other courts have held that a riparian owner has no vested right to future accretions.

In *Western Pac. Ry. Co. v. Southern Pac. Co.*, 151 F. 376 (9th Cir. 1907), for example, the Ninth Circuit Court of Appeals, in rejecting dictum in *County of St. Clair v. Lovingston*, 90 U.S. 46, 68 (1874), that "[t]he riparian right to future alluvion is a vested right[,]" held: "We cannot think that the court meant to announce the doctrine that the right to alluvion becomes a vested right before such alluvion actually exists." *Western Pac. Ry. Co.*, 151 F. at 399. After distinguishing vested, expectant, and contingent rights, the court concluded: "Within that definition of vested rights, there can be no question, we think, that the right to future possible accretion could be divested by legislative action." *Id. See also Cohen v. United States*, 162 F. 364, 370 (C.C.N.D. Cal. 1908) ("The riparian owner has no vested right in future accretions. The riparian owner cannot have a present vested right to that which does not exist, and which may never have an existence.") (citations omitted); *Latourette v. United States*, 150 F. Supp. 123, 126 (D. Ore. 1957) (The "plaintiff had no vested right in the continuance of future accretions to his property by way of sands carried by the winds and in turn washed by the sea upon his lands.").

In a somewhat similar situation, the Hawai'i Supreme Court held that it was not unconstitutional

to terminate, by legislation, a statute that granted exclusive fishing rights in offshore fisheries to certain tenants of an ahupua'a. *Damon v. Tsutsui*, 31 Haw. 678, 693 (1930). The supreme court explained that as to these tenants, the repealed statute "amounted to nothing more than an offer to give them certain fishing rights when they should become tenants, – an offer which was withdrawn before they were in a position to accept it." *Id.* at 693. Additionally, the supreme court said:

> When the repealing statute went into effect there had been no identification of the tenant or of the land or of the fishery. Under these circumstances it cannot properly be said that there had been any vesting. "Rights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. On the other hand, a mere expectancy of future benefit, or a contingent interest in property founded on anticipated continuance of existing laws, does not constitute a vested right." 12 C.J. 955. "A mere expectancy of the future benefit, or a contingent interest in property founded upon anticipated continuance of existing laws, is not a vested right, and such right may be enlarged or abridged or entirely taken away by legislative enactment." 6 A. & E. Ency. L. 957. "Rights are vested, in contradiction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person

> or persons as a present interest. They are expectant, when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent, when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting." Cooley, Principles of Constitutional Law, 332, quoted with approval in *Pearsall v. Great Northern Railway*, 161 U.S. 646, 673.

Id. at 693-94.

It is instructive that article XI, section 1 of the Hawai'i State Constitution, which was adopted in 1978, twenty-five years before the passage of Act 73, mandates that

> [f]or the benefit of present and future generations, *the State* and its political subdivisions *shall conserve and protect Hawai'i's natural beauty and all natural resources, including land, water,* air, minerals and energy sources, *and shall promote the development and utilization of these resources in a manner consistent with their conservation* and in furtherance of the self-sufficiency of the State.
>
> *All public natural resources are held in trust by the State for the benefit of the people.*

(Emphases added.) The Hawai'i Supreme Court has stated that the foregoing provision adopts "the public trust doctrine as a fundamental principle of

constitutional law in Hawai'i," *In re Water Use Permit Applications*, 94 Hawai'i 97, 132, 9 P.3d 409, 444 (2000), and that "[t]he public trust is a dual concept of sovereign right and responsibility." *Id.* at 135, 9 P.3d at 447. The foregoing constitutional provision clearly diminishes any expectation that oceanfront owners in Hawai'i had and may have in future accretions to their property.

Here, Plaintiffs have no vested right to future accretions that may never materialize and, therefore, Act 73 did not effectuate a taking of future accretions without just compensation.

B. Whether Act 73 Effectuated an Uncompensated Taking of Littoral Owners' Existing Accreted Lands

1.

On appeal, the State classifies accreted lands into three categories: (1) Class I accreted lands – those lands that accreted before the effective date of Act 221, i.e., before June 4, 1985; (2) Class II accreted lands – those lands that accreted after the effective date of Act 221 but before the effective date of Act 73, i.e., between June 4, 1985 and May 19, 2003; and (3) Class III accreted lands – those lands that accreted on or after the effective date of Act 73, i.e., on or after May 20, 2003.

The State then argues that (1) "Act 221 was prospective and did *not* affect Class I accreted lands" but "essentially prohibited littoral landowners from

claiming any interest in Class II accreted lands unless and until they became permanent, i.e., until they stayed in existence for 20 years"; (2) before any Class II accreted land could become permanent, Act 73 was enacted, "which denied non-State oceanfront landowners ownership of accreted lands (except to the extent the accretion restored previously eroded land) and made it all State land"; (3) neither Act 221 nor Act 73 affected littoral owners' interest in Class I accretions and, therefore, no taking of Class I accretions has occurred; (4) because Class II accretions, by definition, did not form until June 4, 1985, none of these accretions could have been in existence for twenty years at the time Act 73 became effective and, therefore, littoral owners had no vested property right in the Class II accretions that could be taken away by Act 73; they just had a hope that sometime in the future they might be able to assert control and dominion over Class II accretions; and (5) Act 73 did not effect a taking of Class III accretions, as those accretions did not physically exist at the time Act 73 became effective.

Contrary to the State's argument, however, Act 221, on its face, did not affect the common-law rights of a littoral owner to accreted lands. Indeed, the legislative history of Act 221 expressly mentions that the legislature did "not intend to affect the existing law in regard to ownership of and other rights relating to land created by accretion[.]" H. Stand. Comm. Rep. No. 346, in 1985 House Journal at 1142-43. As discussed above, Act 221 merely established a burden

of proof and clear standards for registering or quieting title to accreted lands. More specifically, Act 221 provided that in order to register or quiet title to accreted lands, a littoral owner was required to prove, by a preponderance of the evidence, that the accretion was natural and permanent (i.e., in existence for twenty years). Act 221 did not change the supreme court's precedent that accreted land above the high-water mark belongs to the littoral owner of the land to which the accretion attached. Act 221 also did not provide that all accreted land above the high-water mark was public or state land until the littoral owner proves that the accretion was natural and permanent.

The State is also mistaken that littoral owners had no ownership interest in Class II accretions at the time Act 73 was enacted. As discussed above, at the time Act 73 was enacted, it was Hawai'i common law that shoreline property from the sea to the high-water mark was owned by the State, and any ocean-front accretions above the high-water mark belonged to the adjoining property owner, irrespective of whether a metes-and-bounds description of the accreted lands was included in the deed of the ocean-front property owner. Act 73 clearly changed the common law by declaring that all accreted lands "not otherwise awarded" and not previously recorded or the subject of a then-pending registration or quiet-title proceeding was now state or public property. Therefore, littoral owners who had such accreted lands when Act 73 became effective on May 20, 2003 had their ownership rights in their accreted lands

taken from them by the passage of Act 73. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

In *Loretto,* the United States Supreme Court held:

> [W]hen the character of the governmental action is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.
>
> The historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such an appropriation is perhaps the most serious form of invasion of an owner's property interests. To borrow a metaphor, the government does not simply take a single "strand" from the "bundle" of property rights: it chops through the bundle, taking a slice of every strand.
>
> Property rights in a physical thing have been described as the rights "to possess, use and dispose of it." To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. First, the owner has no right to possess the occupied space himself [or herself], and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been

> considered one of the most treasured strands in an owner's bundle of property rights. Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he [or she] not only cannot exclude others, but can make no nonpossessory use of the property. Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, it is clearly relevant.

Id. at 435-36 (citations, internal quotation marks, and footnotes omitted). Act 73 permanently divested a littoral owner of his or her ownership rights to any existing accretions to oceanfront property that were unregistered or unrecorded as of the effective date of Act 73 or for which no application for registration or petition to quiet title was pending and, therefore, Act 73 effectuated a taking of such accretions.

2.

The parties do not dispute that there was a legitimate public purpose for the passage of Act 73. Since the parties stipulated to an appeal of the circuit court's declaratory judgment, the circuit court did not decide Plaintiffs' claim that Plaintiffs and the class they represent were entitled to damages for the taking of their property. On remand, the circuit court must do so.

As mentioned earlier, the circuit court's Class Certification Order was not certified as a final judgment

for appeal purposes and is not before us. While certification of a class for purposes of determining generically whether Act 73 effectuated a taking of littoral owners' future accretions might have been appropriate, we have questions about whether the class certification was proper for determining whether Act 73 effectuated a taking of those accretions existing as of the effective date of Act 73, since each littoral owner's factual situation regarding existing accretions would be different and not conducive to class adjudication.

Moreover, the United States Supreme Court has held that a court should not decide an inverse-condemnation claim where a party does not identify specific property that has allegedly been taken by the government. In *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981), the plaintiff challenged the constitutionality of the Surface Mining Control and Reclamation Act of 1977, a federal act that placed restrictions and conditions on mining operations. The district court found these restrictions and conditions to be unconstitutional takings. *Id.* at 294. On appeal, the Supreme Court held that

> the [d]istrict [c]ourt's ruling on the "taking" issue suffers from a fatal deficiency: neither appellees nor the court identified any property in which [appellees] have an interest that has allegedly been taken by operation of the Act. By proceeding in this fashion, the court below ignored this Court's oft-repeated admonition that the

constitutionality of statutes ought not to be decided except in an actual factual setting that makes such a decision necessary. Adherence to this rule is particularly important in cases raising allegations of an unconstitutional taking of private property. Just last Term, we reaffirmed that

> "this Court has generally 'been unable to develop' any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.' Rather, it has examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors – such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action – that have particular significance."

These "ad hoc, factual inquiries" must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances.

Because appellees' taking claim arose in the context of a facial challenge, it presented no concrete controversy concerning either

> application of the Act to particular surface mining operations or its effect on specific parcels of land. Thus, the only issue properly before the District Court and, in turn, this Court, is whether the "mere enactment" of the Surface Mining Act constitutes a taking. The test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it "denies an owner economically viable use of his land[.]"

Id. at 294-95.

The Supreme Court further stated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), that "we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely upon the particular circumstances in that case." (Citations, internal quotation marks, and brackets omitted.) The *Penn Central* Court identified "several factors that have particular significance" in "engaging in these essentially ad hoc, factual inquiries[.]" *Id.* According to the Supreme Court,

> [t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be

> characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Id. (citations omitted.)

Notably absent from Plaintiffs' complaint is any allegation that Plaintiffs have ownership rights in accreted lands that existed at the time Act 73 was enacted. Moreover, the deeds by which Plaintiffs acquired the beach-reserve lots suggest that there were seawalls built on the lots, raising questions concerning the existence of any accretions. Because Plaintiffs have not alleged specific accretions which the State has taken from them by the enactment of Act 73 and, more damagingly, have not alleged that any accreted land even exists, the circuit court, on remand, must determine whether Plaintiffs have been injured by the enactment of Act 73.

CONCLUSION

We conclude that (1) Plaintiffs and the class they represented had no vested property rights to future accretions to their oceanfront land and, therefore, Act 73 did not effect an uncompensated taking of future accretions; and (2) Act 73 effectuated a permanent taking of littoral owners' ownership rights to existing accretions to the owners' oceanfront properties that had not been registered or recorded or made the subject of a then-pending quiet-title lawsuit or petition to register the accretions.

Accordingly, we vacate that part of the PSJ order which concluded that Act 73 took from oceanfront owners their property rights in all future accretion that was not proven to be the restored portion of previously eroded land. We remand this case to the circuit court for a determination of whether Plaintiffs have accreted lands that existed when Act 73 was enacted and, if so, for a determination of the damages they incurred as a result of the enactment of Act 73.

Girard D. Lau,
Deputy Attorney General
(William J. Wynhoff,
Deputy Attorney General,
with him on the briefs),
State of Hawai'i,
for Defendant-Appellant.

Paul Alston
(Laura P. Couch
with him on the briefs)
(Alston Hunt Floyd & Ing)
for Plaintiffs-Appellees.

Carl C. Christensen
on the amicus curiae brief
for Hawaii's Thousand Friends.

Robert H. Thomas
(Damon Key Leong Kupchak Haster)
on the amicus curiae brief
for Pacific Legal Foundation
Hawaii Center.

CONCURRING AND DISSENTING OPINION BY NAKAMURA, C.J.

I concur in the analysis and result reached by the majority on the issues of whether Act 73, 2003 Haw. Sess. Laws at 128-30 (Act 73), effected an uncompensated taking with respect to future accretions and existing accretions to private oceanfront property. However, the circuit court's Class Certification Order was not appealed, and the appropriate remedy for any uncompensated taking effected by Act 73 was not an issue before this court. I would not address and do not express any view on matters that were not before us. To that extent, I respectfully dissent from the majority's opinion.

FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 28175

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

MAUNALUA BAY BEACH OHANA 28, a Hawai'i non-profit corporation; MAUNALUA BAY BEACH OHANA 29, a Hawai'i non-profit corporation; MAUNALUA BAY BEACH OHANA 38, a Hawai'i non-profit corporation, individually and on behalf of all others similarly situated, Plaintiffs-Appellees,

v.

STATE OF HAWAI'I, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT
OF THE FIRST CIRCUIT
(Civil No. 05-1-0904)

AMENDED ORDER
DENYING PLAINTIFFS-APPELLEES'
MOTION FOR RECONSIDERATION OF OPINION
(By: Foley and Fujise, JJ.; Nakamura, C.J., concurring separately and dissenting)[1]

[1] Former Associate Judge Corinne K.A. Watanabe was a member of the panel on this appeal but retired from her judgeship effective December 31, 2009. Associate Judge Alexa D.M. Fujise was assigned to the panel to fill the vacancy created by the retirement of Judge Watanabe.

Upon consideration of Plaintiffs-Appellees' January 11, 2010 Motion for Reconsideration of the Intermediate Court of Appeals' Opinion filed on December 30, 2009, the papers in support of the motion, and the records and files in this case,

IT IS HEREBY ORDERED that the motion is denied.

DATED: Honolulu, Hawaii, January 20, 2010.

On the motion:

Paul Alston and
Laura Couch
for Plaintiffs-Appellees.

Associate Judge

Associate Judge

I concur in the denial of Plaintiffs-Appellees' Motion for Reconsideration, except that, consistent with my concurring and dissenting opinion, I would grant Plaintiffs-Appellees' motion to the extent it seeks reconsideration of matters addressed in the majority opinion that were not before this court on appeal.

Chief Judge

NO. 28175

IN THE SUPREME COURT OF
THE STATE OF HAWAI'I

MAUNALUA BAY BEACH OHANA 28, a Hawai'i non-profit corporation; MAUNALUA BAY BEACH OHANA 29, a Hawai'i non-profit corporation; MAUNALUA BAY BEACH OHANA 38, a Hawai'i non-profit corporation, individually and on behalf of all others similarly situated, Petitioners/Respondents/Plaintiffs-Appellees,

vs.

STATE OF HAWAI'I,
Respondent/Petitioner/Defendant-Appellant.

CERTIORARI TO THE
INTERMEDIATE COURT OF APPEALS
(CIV. NO. 05-1-0904-05 EEH)

ORDER REJECTING APPLICATIONS
FOR WRIT OF CERTIORARI

(By: Moon, C.J., for the majority[1]; Acoba, J., dissenting, with whom Duffy, J., joins)

Petitioners/respondents/plaintiffs-appellees Maunalua Bay Beach Ohana 28, Maunalua Bay Beach Ohana 29, and Maunalua Bay Beach Ohana 38's application for writ of certiorari, filed April 22, 2010, and respondent/

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[1] The majority: Moon, C.J.,. Nakayama and Recktenwald, JJ.

petitioner/defendant-appellant State of Hawaii's application for writ of certiorari, filed April 26, 2010, are hereby rejected.

DATED: Honolulu, Hawai'i, June 9, 2010.

Paul Alston and
Laura P. Moritz, for
petitioners/respondents/
plaintiffs-appellees

FOR THE COURT:

Chief Justice

Girard D. Lau and William
J. Wynhoff, Deputy Attorneys
General, for respondent/
petitioner/defendant-appellant

DISSENT BY ACOBA, J., WITH WHOM DUFFY, J., JOINS

I would accept the application for writ of certiorari,[1] filed by Petitioners & Respondents/Plaintiffs-Appellees Maunalua Bay Beach Ohana 28, Maunalua Bay Beach Ohana 29, and Maunalua Bay Beach

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[1] This court can accept certiorari to clarify a decision of the Intermediate Court of Appeals (ICA). *See State v. Mikasa*, 111 Hawai'i 1, 1,135 P.3d 1044, 1044 (2006) (affirming the ICA, but granting certiorari "to clarify the application by [the ICA] of the law relevant to a defendant's claim"); *Nacino v. Koller*, 101 Hawai'i 466, 467, 71 P.3d 417, 418 (2003) (affirming the ICA, but granting certiorari "to clarify the law regarding . . . the statute involved"); *Korsak v. Hawai'i Permanente Med. Group*, 94 Hawai'i 297, 300, 12 P.3d 1238, 1241 (2000) (granting certiorari "to clarify several aspects of the ICA opinion").

Ohana 38, all Hawai'i non-profit corporations, individually and on behalf of all others similarly situated (collectively, Plaintiffs) on April 22, 2010 (Plaintiffs' Application), and the application for writ of certiorari filed by Respondent & Petitioner/Defendant-Appellant State of Hawai'i (the State) on April 26, 2010 (State's Application).[2]

I.

Briefly stated, the instant case arises out of a class inverse condemnation[3] suit in which Plaintiffs allege that Act 73, effective on May 20, 2003, effected a taking of accreted lands over which they maintain ownership rights and of future accretion, and therefore, that they are entitled to just compensation under the Hawai'i Constitution.

Under common law, oceanfront littoral landowners[4] (littoral owners) generally own accreted land. In

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[2] On May 13, 2010, the Pacific Legal Foundation filed a memorandum as an amicus curiae in support of Plaintiffs' application. On May 13, 2010, Hawai'i's Thousand Friends filed a brief as an amicus curiae in opposition to Plaintiffs' application.

[3] "Inverse condemnation" is defined as "[a]n action brought by a property owner for compensation from a governmental entity that has taken the owner's property without bringing formal condemnation proceedings." *Black's Law Dictionary* 332 (9th ed. 2004).

[4] The term "littoral" means "[o]f or relating to the coast or shore of the ocean." *Black's Law Dictionary* at 1018. The littoral owner is thus, the shoreline owner of property directly abutting the ocean.

1985, Act 221 was enacted, which amongst other things, added a new section, HRS § 183-45, to Chapter 183 of the Hawai'i Revised Statutes (HRS). That section prohibited the erection of structures or retaining walls, dredging or grading, or any other use of accreted lands which interferes or may interfere with the future natural course of the beach, including erosion and accretion, and imposed penalties for violations of that section.[5]

Act 221 also added a new section to Chapter 501 of the HRS, which was designated HRS § 501-33, and required that an applicant attempting to register accreted land prove by a preponderance of the evidence that such land was natural and permanent. The new section defined "permanent" as accreted land having been in existence for at least twenty

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[5] That section, HRS § 183-45 provided as follows:

> **§ 183-45 Accreted land.** *No structure, retaining wall, dredging, grading, or other use which interferes or may interfere with the future natural course of the beach, including further accretion or erosion, shall be permitted to accreted land as judicially decreed under section 501-33 or 669-1(e).* This provision shall not in any way be construed to affect state of county property.
>
> *Any structure or action in violation of this provision shall be immediately removed or stopped and the property owner shall be fined in accordance with section 183-41(e).* Any action taken to impose or collect the penalty provided for in this subsection shall be considered a civil action.

1985 Haw. Sess. Laws Act 221, § 1 at 401 (emphases added).

years (20-year requirement). HRS § 501-33 provided as follows:

> **§ 501-33 Accretion to land.** *An applicant for registration of land by accretion shall prove by a preponderance of the evidence that the accretion is natural and permanent. 'Permanent' means that the accretion has been in existence at least twenty years.* The accreted portion of the land shall be considered within the conservation district unless designated otherwise by the land use commission under chapter 205. Prohibited uses are governed by section 183-45.

1985 Haw. Sess. Laws Act 221, § 2 at 401-02 (emphasis added). Correlatively, Act 221 revised HRS § 669-1 to require the same burden of proof for persons filing actions to quiet title in accreted lands. HRS § 669-1 was amended to read as follows:

> (e) Action may be brought by any person to quiet title to land by accretion. *The person bringing the action shall prove by a preponderance of the evidence that the accretion is natural and permanent. 'Permanent' means that the accretion has been in existence for at least twenty years.* The accreted portion of land shall be considered within the conservation district unless designated otherwise by the land use commission under chapter 205. Prohibited uses are governed by section 183-45.

1985 Haw. Sess. Laws Act 221, § 3 at 402 (emphasis added).

In 2003, Act 73 was enacted and amended HRS § 501-33 to provide in pertinent part that "*no applicant other than the State shall register land accreted along the ocean*, except that a private property owner whose eroded land has been restored by accretion may file an accretion claim to regain title to the restored portion." 2003 Haw. Sess. Laws Act 73, § 4 at 129 (emphasis added). Act 73 also amended HRS § 669-1 to provide in pertinent part that "*no action shall be brought by any person other than the State to quiet title to land accreted along the ocean*, except that a private property owner whose eroded land has been restored by accretion may also bring such an action for the restored portion." 2003 Haw. Sess. Laws Act 73, § 5 at 129 (emphasis added). Act 73 also amended the definition of "public lands," HRS § 171-2, to include "accreted lands[6] not otherwise awarded." 2003 Haw. Sess. Laws Act 73, § 2 at 128. Act 73 expressly provided that it would not apply to pending registrations of accreted land or actions to quiet title, but only to registrations and actions filed after the effective date of Act 73. Act 73 provides that

> [a]pplications for the registration of land by accretion and actions to quiet title to land by accretion *pending at the time of the effective date of this Act shall be processed under the*

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[6] Act 73 amended the definition section of chapter 171, HRS § 171-1 to include a definition of "accreted lands" defined as "lands formed by the gradual accumulation of land on a beach or shore along the ocean by the action of natural forces." 2003 Haw. Sess. Laws Act 73, § 1 at 128.

> *law existing at the time the applications and actions were filed with the court.* Applications for the registration of land by accretion and actions to quiet title to land by accretion *filed subsequent to the effective date of this Act shall be processed in accordance with this Act.*

2003 Haw. Sess. Laws Act 73, § 6 at 130 (emphases added). As previously indicated, the effective date of Act 73 was May 20, 2003.

II.

On September 12, 2006, the court filed an order approving the parties' stipulation for leave to file an interlocutory appeal as to the court's partial summary judgment order (PSJ order). The State claimed on appeal that Act 221 had the effect of denying all ownership rights over lands which accreted after the effective date of Act 221, but before the effective date of Act 73. The ICA determined however, that "Act 221, on its face, did not affect the common-law rights of a littoral owner to accreted lands[,]" and "did not change the supreme court's precedent that accreted land above the high-water mark belongs to the littoral owner of the land to which the accretion attached." According to the ICA, "oceanfront accretions above the high-water mark belonged to the adjoining property owner[.]" *Maunalua Bay Beach Ohana 28 v. State*, 122 Hawai'i 34, 54, 55, 222 P.3d 441, 461, 462 (2009). The ICA thus rejected the State's contention

that littoral owners had no ownership rights in lands which accreted after the effective date of Act 221.

The ICA also determined that "Act 73 effectuated a permanent taking of littoral owners ownership rights to existing accretions . . . that had not been registered or recorded or made the subject of a then-pending quiet-title lawsuit or petition to register the accretions." *Id.* at 57, 222 P.3d at 464. According to the ICA, "Act 73 clearly changed the common law by declaring that all accreted lands [(except for the two exceptions)[7] were now state or public property." *Id.* at 55, 222 P.3d at 462. Thus, "littoral owners who had such accreted lands when Act 73 became effective on May 20, 2003 had their ownership rights in their accreted lands taken from them by the passage of Act 73." *Id.*

With respect to future accretion, the ICA determined that "Plaintiffs and the class they represented had no vested property rights to future accretions to their oceanfront land and, therefore, Act 73 did not effect an uncompensated taking of future accretions[.]" *Id.* at 54, 222 P.3d at 461.

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[7] As indicated, there are two statutory exceptions listed in Act 73 to the prohibition against registration and quiet title actions by non-government landowners. These exceptions are (1) private property owners whose eroded land had been restored by accretion may bring an action for the restored portion and (2) private property owners who had applications to register accreted lands or actions to quiet title in such lands pending as of the effective date of Act 73. 2003 Haw. Sess. Laws Act 73, §§ 4-6 at 129-30.

Although the issue of whether class certification was "*not certified as final judgment* for appeal purpose and [was *not before the [ICA,]*" the ICA noted that, although "certification of a class for purposes of determining generically whether Act 73 effectuated a taking of littoral owners' future accretions might have been appropriate," it had "questions about whether the class certification was proper for determining whether Act 73 effectuated a taking of those accretions existing as of the effective date of Act 73, since each littoral owner's factual situation regarding existing accretions would be different and not conducive to class adjudication." *Id.* at 55-56, 222 P.3d at 462-63 (emphases added). The ICA also stated that "[n]otably absent from Plaintiffs' complaint [was] any allegation that Plaintiffs [had] ownership rights in accreted lands that existed at the time Act 73 was enacted." *Id.* at 56, 222 P.3d at 463.[8]

The ICA ultimately vacated "that part of the [court's] PSJ order which concluded that Act 73 took from oceanfront owners their property rights in all future accretion that was not proven to be the restored portion of previously eroded land[,]" and remanded the case to the court "for a determination of whether Plaintiffs [had] accreted lands that existed when Act 73 was enacted and, if so, for a determination of the damages they incurred as a

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[8] In their application, Plaintiffs assert that these statements were improper. *See infra*.

result of the enactment of Act 73." *Id.* at 57, 222 P.3d at 464.

The State subsequently filed a motion for clarification arguing that the ICA's holding should be clarified to establish that its holding that Act 73 effected a taking, did not include lands which accreted *prior* to the effective date of Act 221. The State also filed a motion seeking an award of attorneys' fees pursuant to the private attorney general doctrine, and costs pursuant to Hawaii Rules of Appellate Procedure (HRAP) Rule 39. The ICA denied both motions without any explanation. In its application, the State challenges the ICA's denial of its motion for clarification. Additionally, Plaintiffs challenge the ICA's denial of its requests for attorneys' fees and costs.

III.

The State's Application raises the following questions:

> 1. *Did the ICA err in failing to clarify its decision to make clear that Act 73 did not effect a Taking with respect to [land which accreted prior to June 4, 1985, the effective date of Act 221]*, because, inter alia, the State has always taken the position that Act 73 has no effect upon [land which accreted prior to June 4, 1985, the effective date of Act 221], and because Act 73 cannot properly be construed to affect [land which accreted prior to the effective date of Act 221]?

> 2. *Did the ICA err in holding that Act 73 effected a Taking with respect to [land which accreted after Act 221 became effective*, but before the effective date of Act 73], because, inter alia, it incorrectly construed Act 221's 'permanency' requirement that newly accreted land remain for 20 years as only restricting a littoral owner's ability to register or quiet title to the accretions, but as having no impact on the ownership of the accretions?

(Emphases omitted and emphases added.)

Plaintiffs' Application raises the following questions:

> 1. Did the ICA commit grievous error and disregard controlling decisions from this [c]ourt when it held that the State can permanently fix the seaward boundary of oceanfront properties and *deprive littoral property owners of future accretion* without paying just compensation?
>
> 2. Did the ICA commit grievous error *by* ***sua sponte*** *criticizing the [c]ircuit [c]ourt's order granting class certification – which was not appealed* – without notice to the parties and without any valid basis for suggesting that class certification was improper?
>
> 3. Did the ICA commit grievous error by flagrantly *misstating the record regarding the Petitioners' ownership of accreted land*, the exercise of which was never disputed by the State?

> 4. When [Plaintiffs] proved the State unconstitutionally took accreted beachfront land from property owners throughout the islands, did the ICA grievously err and disregard this [c]ourt's decisions in *holding that [Plaintiffs] were not entitled to fees under the private attorney general doctrine*?

(Underscored and bolded emphases omitted and emphases added.)

IV.

In connection with the first question presented in the State's Application, the State argues that Act 73 did not effect a taking as to land which accreted before the effective date of Act 221 because (1) Act 73 may not apply retroactively as HRS § 1-3 prohibits retroactive application of laws unless "'otherwise expressed or obviously intended'" and Act 73 cannot be construed as such, (2) it has always been the State's position that Act 73 did not affect lands which accreted prior to the effective date of Act 221 and "littoral owners with [such land] are not barred by Act 73, even today, from registering or quieting title to such accreted lands[,] and (3) because the State does not assert ownership over those lands, Plaintiffs' takings claim as to those lands "is not ripe."[9]

In connection with the second question presented in the State's Application, the State argues that the

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[9] This claim was not raised on appeal to the ICA.

20-year requirement set forth under Act 221 "applied not only to registration and quieting title, but to ownership as well[,]" (emphasis omitted), and consequently, no person could have owned any land which accreted after the effective date of Act 221, but before the effective date of Act 73, because none of those lands could have become permanent (there being less than 18 years between those two acts). The State contends that construing Act 221 as not affecting ownership would be incorrect because (1) landowners would not be able to "register or quiet title to those accretions, [but] they would be able to exercise every meaningful ownership interest in those accretions, including excluding the public from [those lands,]" (2) such construction would undermine the purpose of protecting public access to and enjoyment of Hawai'i's beaches and Hawai'i's constitutional commitment to conserving Hawai'i's natural resources for the benefit of the people.

V.

In connection with the first question presented in Plaintiffs' application, they argue that (1) the cases relied on by the ICA in holding that Plaintiffs had no vested right to future accretions were inapplicable, (2) other courts have held that the government may not "fix" the movable shoreline boundary, (3) in particular, *United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009), held that the riparian right to future accretion is a vested right.

In connection with the second question presented in their application, Plaintiffs argue that the ICA misstated the record regarding Plaintiffs' ownership rights because (1) the record indicates that evidence regarding ownership would go to issues on damages as opposed to liability and Plaintiffs advised the court that witnesses would testify on their behalf regarding the amount and value of the property "taken" by Act 73, and (2) conveyance documents indicate that accreted lands were conveyed to Plaintiffs.

In connection with the third question presented in their application, Plaintiffs argue that the ICA gravely erred in criticizing class certification because (1) the propriety of certification was not before the court, (2) trial courts have broad discretion over class certifications and their decision is normally undisturbed on appeal (citing *Life of the Land v. Land Use Comm'n of State of Hawai'i*, 63 Haw. 166, 623 P.2d 431), (3) "[i]t 'is well-settled that all unchallenged conclusions by the circuit court are considered binding upon this [c]ourt[,]'" (quoting *Alvarez Family Trust v. AOAO Kaanapali Alii*, 121 Hawai'i 474, 467, 221 P.3d 452, 489 (2009) (other citation omitted)), and (4) even if class certification was properly before the ICA, class certification is proper in inverse condemnation cases "because the landowners' damages are formulaic and easily calculated[,]" (citation omitted).

In connection with the fourth question presented in their application, Plaintiffs argue that the ICA gravely erred in summarily denying Plaintiffs' request for attorney's fees under HRAP Rule 39(b) and

the private attorney general doctrine "or at a minimum[, in] denying [its request] without prejudice so that [Plaintiffs] could renew their request on remand."

VI.

As previously stated, under common law, littoral owners owned all accreted lands and could therefore legally assert ownership in those lands by registering those lands or bringing an action to quiet title thereto. Act 221, which was enacted in 1985, essentially required that any person attempting to register or quiet title in accreted land, prove by a preponderance of the evidence that the accretion was natural and permanent, defined as accretion having been in existence for at least twenty years. *See* 1985 Haw. Sess. Laws Act 221, § 3 at 401-02.

It is not entirely clear from the plain language of Act 221, whether the littoral owner maintains ownership over accreted lands during the pendency of the 20-year period. The statute does not expressly state that the littoral owner does not own accreted land, unless and until the owner is able to prove that it has been in existence for at least 20 years, as the State would contend. Rather, the plain language of Act 221 requires an applicant seeking to register or quiet title in accreted lands to "*prove by a preponderance of the evidence* that the accretion is natural and permanent," i.e., that the accretion has been in existence for at least 20 years. *See* 1985 Haw. Sess. Laws Act 221,

§ 3 at 401-02. This would seem to enact an evidentiary standard or burden of proof for legally asserting one's ownership rights in accreted lands. On the other hand, because Act 221 prohibits the littoral owner from legally asserting or recording his or her ownership interest in accreted lands, in the absence of meeting the 20-year requirement, the act may be construed to affect the littoral owners' ownership rights in accreted lands.[10] With regard to its effect on the ownership rights of littoral owners then, Act 221 is ambiguous, and legislative history must be resorted to.

The legislative history indicates that the 20-year requirement for registering accreted lands or bringing actions to quiet title in such land, was intended as part of an evidentiary standard as opposed to an alteration of the existing common law ownership rights in accreted lands. The legislative history states:

> Your Committee amended the bill to clarify that an applicant for registration of land by accretion or a person brining an action to quiet title to land by accretion shall prove by a preponderance of the evidence that the accretion is natural and permanent.

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[10] Notably, if the State's interpretation of Act 221 were accepted, and Act 221 did actually divest littoral owners of ownership over accreted lands, unless and until the owner was able to prove that such lands had been in existence for at least 20 years, Act 221 arguably effected a taking.

> This clarification better emphasizes the *standard of proof* that must be met in such cases.

S. Stand. Comm. Rep. No 194, in 1985 Senate Journal, at 1292 (emphasis omitted and emphasis added). The legislature expressly stated that it "*[did] not intend to affect the existing law in regard to ownership* of and other rights relating to land created by accretion," and that "*it [was] the intent of [the legislature] that the bill . . . not affect existing law.*" H. Stand. Comm. Rep. No. 194, in 1985 House Journal, at 1143 (emphases added).

Inasmuch as the legislative history reveals that the legislature did not intend for Act 221 to affect the landowners' right of ownership in accreted lands, littoral owners continued to own those lands notwithstanding the passage of Act 221. Rather, Act 221 "emphasize[d] the standard or proof that must be met[,]" in the event that the landowner attempted to establish ownership by registering or quieting title to accreted land. S. Stand. Comm. Rep. No. 194, in 1985 Senate Journal, at 1292.

This interpretation is further supported by the 20-year requirement which was intended to provide a "clear standard for determining when accreted land becomes permanent and *stable*." *Id.* at 1291 (emphasis added). It is apparent that Act 221 did not change ownership, but as pointed out by Plaintiffs, "merely created a system for minimizing boundary disputes that arose from the changeable nature of the high

water mark." As further noted by Plaintiffs, Act 221 accomplished this by imposing "a 'waiting period' for recording title to impermanent 'accretion' which comes and goes with the seasons[,]" and thereby "create[d] a period of 'stability' for recording, but it did not affect ownership[,]" which was constantly changing due to the moveable and unpredictable nature of the high water mark.

VII.

As noted by the ICA, prior to Act 73, under Hawai'i common law, the State owned the land from the sea to the highwater mark and all land above the high water mark including accretion, was owned by the littoral owner. In 2003, Act 73 amended Hawai'i law such that only the State could register or quiet title in accreted lands, unless the private property owner's land had been restored by accretion or the owner had an action pending, under the law set forth by Act 221, as of the effective date of Act 73. 2003 Haw. Sess. Laws Act 73, §§ 4-5 at 129-30. Additionally, Act 73 declared all land which had not been previously registered or in which title had not been quieted, State land. *Id.* Of course, the "legislature may, by legislative act, change or entirely abrogate common law rules through its exercise of the legislative power under the Hawaii State Constitution, but in the exercise of such power, the legislature may not violate a constitutional provision." *Fujioka v. Kam*, 55 Haw. 7, 10, 514 P.2d 568, 570 (1973). It is clear then, that the legislature was free to eliminate littoral

owners' common law right to accretion, so long as in doing so, the legislature did not violate a constitutional provision. It is well established that the government may "take" private property for public use[11] and that such taking does not violate the constitution if the government pays just compensation. Haw. Const. art I, § 20. Thus, the legislature could abrogate entirely the common law right of littoral owners to accreted lands, subject only to the requirement that the government pay just compensation for those lands.

As reiterated, Act 73 specifically states that "no applicant *other than the State* shall register [or quiet title in] land accreted along the ocean," subject to the two exceptions discussed *supra*. 2003 Haw. Sess. Laws Act 73, §§ 4-6 at 129-30 (emphasis added). Furthermore, Act 73 amended the definition of "public lands," HRS § 171-2, to include "accreted lands not otherwise awarded." 2003 Haw. Sess. Laws Act 73, § 2 at 128. Thus, inasmuch as Act 73 prohibits any applicant other than the State from registering or quieting title in accreted lands, subject to the two exceptions, Act 73 declares all accreted land that had not yet been registered or in which title had not been quieted, State land.

Hence, Act 73 manifestly effected a taking as to all accreted lands which had not been registered or in

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[11] Plaintiffs do not dispute that if Act 73 "takes" private property, it is for a public use.

which title had not been quieted, with the exception of accreted lands for which petitions for registration or actions to quiet title were pending as of the effective date of Act 73 or previously eroded land that had been restored by accretion.

VIII.

On appeal, the State specifically argued that Act 73 had no effect "whatsoever upon [accretions which took place prior to the effective date of Act 221], and thus necessarily no taking of [those lands] has occurred." The State maintains that, consequently, littoral owners with land that accreted prior to the effective date of Act 221, "are not barred by Act 73, even today, from registering or quieting title to such accreted lands." While the ICA determined that "Act 73 effectuated a permanent taking of littoral owners' ownership rights to existing accretions to the owners' oceanfront properties that had not been registered or recorded or made the subject of a then-pending quiet-title lawsuit or petition to register the accretions[,]" *Maunalua Bay*, 122 Hawai'i at 57, 222 P.3d at 464, it did not expressly indicate whether its holding excluded or included lands which accreted prior to the effective date of Act 221.

Furthermore, the ICA summarily denied the State's motion for clarification on January 20, 2010. In connection with the first question presented in its application, the State contends that the ICA erred in failing to clarify that Act 73 "did not apply to [land

which accreted prior to the effective date of Act 221]." In light of the State's position that Act 221 had no effect on lands which accreted prior to its effective date, and that thus, Act 73 had no effect on such lands, the ICA should have made clear that its holding did in fact include lands which accreted prior to the effective date of Act 221. Accordingly, the State's application should be granted as to its first question.

IX.

In connection with the first question presented in Plaintiffs' Application, regarding the effect of Act 73 on future accretion, "a claimant must first establish 'a vested interest protectable under the Fifth Amendment[,]'" to succeed on a takings claim. *Kepoo v. Kane*, 106 Hawai'i 270, 294, 103 P.3d 939, 963 (2005) (quoting *Sangre de Cristo Dev. Co. v. United States*, 932 F.2d 891, 894 (10th Cir. 1991) (brackets omitted)).[12] In addition to the cases cited to by the State, *Kepoo*, 106 Hawai'i at 270, 103 P.3d at 963, held that the voiding of a lease of state land to developers for construction and operation of a cogeneration power plant did not constitute a taking.

This court explained that it was not a taking inasmuch as the plaintiffs "did not acquire a vested interest in the lease because it was not preceded by the requisite environmental study, which, in Hawai'i,

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[12] *Kepoo* was not cited by the parties or the ICA.

is a condition precedent to approval of the request and commencement of proposed action." *Id.* at 295, 103 P.3d at 964 (internal quotation marks and citations omitted). Thus, it would seem that there can be no vested right for purposes of a takings analysis, where a particular property right is subject to a condition precedent.

Prior to the effective date of Act 73, the littoral owners' right to future accretion was subject to the condition precedent that the land would in fact accrete at some point in the future. That right, because contingent on events which may or may not happen at some point in the future, would not be vested. Furthermore, the legislature was free to abrogate that property right. *Fujioka*, 55 Haw. at 10, 514 P.2d at 57; *Damon v. Tsutsui*, 31 Haw. 678, 693-94 (Haw. Terr. 1930). Once Act 73 made all accreted lands, which had not been registered or to which title had not been quieted, State lands, all subsequent accretions to those lands become State lands. Thus, as of the effective date of Act 73, any right to future accretions then became vested in the State, not the littoral owner. *See infra*.

State by Kobayashi v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977), provides further instruction. In *Zimring*, the State of Hawaii sought to quiet title in itself "to approximately 7.9 acres of new land added to the acreage of the island of Hawaii when the Puna volcanic eruption of 1955 overflowed the shoreline and extended it [(hereinafter, lava extensions)]." *Id.* at 107, 566 P.2d at 727. The defendants, owners of a

parcel of land next to those lava extensions, "entered upon [them] and made improvements thereon which included bulldozing and planting trees and shrubs." *Id.* at 108, 566 P.2d at 728. The State served the [defendants] with a notice and demand to vacate the disputed land and to cease and desist from conducting any further activities thereon." *Id.* Thereafter, the State filed a complaint against the defendants and their predecessors-in-interest. *Id.* Following various motions by the parties and an interlocutory appeal, the court concluded, *inter alia*, that "[t]he State . . . failed to carry its burden of proof to establish its title in the land." *Id.* at 110, 566 P.2d at 729.

In resolving the State's claim to title over the lava extensions, the *Zimring* court explained that the historical development of "private title in Hawaii[13] makes clear the validity of the basic proposition in Hawaiian property law that land in its original state is public land and if not awarded or granted, such land remains in the public domain." *Id.* at 114, 566 P.2d at 731. This court explained that, [a]side from acquisition of documented title, one [could] also show acquisition of private ownership through operation of common law." *Id.* at 114-15, 566 P.2d at 731.

The *Zimring* court agreed with the defendants' statement that "'the common law on accretion and

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[13] For a survey of the historical development of private property ownership in Hawaii, *see Zimring*, 58 Haw. at 106, 566 P.2d at 725.

avulsion in other states [was] not directly on point.'" *Id.* at 119, 566 P.2d at 734. However, this court disagreed with their contention "that the 'logic of cases based on these concepts would lead to the rule that volcanic additions on the Island of Hawaii go to the abutting owner.'" *Id. Zimring* stated that "[w]hen accretion is found, the owner of the contiguous land takes title to the accreted land." *Id.* (citing *Halstead v. Gay*, 7 Haw. 587, 588 (1889). It was explained however, that "[w]hile the accretion doctrine is founded on the public policy that littoral access *should be preserved where possible*, the law in other jurisdictions makes it clear that the *preservation of littoral access is not sacrosanct and must sometimes defer to other interests and considerations*." *Id.* (emphases added).

Zimring cited *Los Angeles Athletic Club v. Santa Monica*, pointing out that in that case, the California District Court of Appeal stated that "'[i]t is well settled that the *littoral rights of an upland owner who owns no title to tidelands adjoining his property are subject to termination by whatever disposition of tidelands the state, or its grantees, in the exercise of their trust, choose to make.*'" *Id.* at 120, 566 P.2d at 734 (quoting *Los Angeles Athletic Club*, 147 P.2d 976, 978 (Cal. Dist. Ct. App. 1944)).

In short, *Zimring* rejected the argument that common law on accretion and avulsion supported the proposition that lava extension should go to the abutting owner. *Id.* at 119, 566 P.2d at 734. It would be inconsistent to acknowledge that the common law

right to accretion "is not sacrosanct[,]" *id.*, and thus, "littoral rights . . . are subject to termination[,]" *id.* (citation omitted), yet find that the right to future accretion is vested and that the State must pay just compensation each time the land further accretes in the future. Such cannot be the case.[14]

While the ICA concluded that Plaintiffs have no vested right in future accretions, it relied on a string of cases from other jurisdictions as well as definition of vested rights set forth in *Tsutsui*, 31 Haw. at 693-94. Both Plaintiffs and amicus curiae, Pacific Legal Foundation, argue that the cases upon which the ICA relied were inapplicable. It is necessary to make clear that Plaintiffs have no vested right under Hawai'i case law. While the ICA reached the proper ultimate conclusion on the issue of future accretions, to the extent the ICA focused on cases from other jurisdictions, it is not clear that the ICA's holding is supported by Hawai'i law and certiorari should be accepted as to Plaintiffs' first question.

B.

As previously stated, Plaintiffs assert that a Ninth Circuit case, *Milner*, 583 F.3d at 1174, supports

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[14] The ICA discussed *Zimring, supra*, in its general review of precedent established by this court. However, it did not cite to *Zimring* in support of its conclusion that Plaintiffs do not have a vested right in future accretion. *See Maunalua Bay*, 122 Hawai'i at 43, 222 P.3d at 450.

the proposition that littoral owners' interest in future accretion is a vested right. In *Milner*, at issue was whether homeowners, who had erected structures to prevent erosion, were liable for, *inter alia*, common law trespass of lands which the United States claimed to have held in trust for the Lummi Nation. *Id.* at 1180. In holding that homeowners had trespassed upon tidelands of the Lummi and wrongfully denied them the right to future accretion, the Ninth Circuit explained that "[u]nder the common law, the boundary between the tidelands and the uplands is ambulatory; that is, it changes when the water body shifts course or changes in volume." *Id.* at 1187 (citations omitted). It was observed that the Supreme Court had stated that

> *"[t]he riparian right to future alluvion*[15] *is a vested right. It is an inherent and essential attribute of the original property*. The title to the increment rests in the law of nature. *It is the same with that of the owner of a tree to its fruits*, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one. *The maxim "qui sentit onus debet sentire commodum" [he who enjoys the benefit ought also to bear the burdens] lies at its foundation. The owner takes the chances*

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[15] Alluvion is the "addition of land caused by the buildup of deposits from running water[.]" *Black's Law Dictionary* at 90. The definition of accretion states that accretion is the "gradual accumulation of land by natural forces, [especially] as alluvium is added to land situated on . . . the seashore." *Id.* at 23.

> *of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if, a gradual gain, it is his.*"

Id. at 1187-88 (emphases added) (quoting *County of St. Clair v. Lovingston*, 90 U.S. 46, 68-69 (1874)). The *Milner* court explained:

> *By this logic, both the tideland owner and the upland owner have a right to an ambulatory boundary, and each has a vested right in the potential gains that accrue from the movement of the boundary line. The relationship between the tideland and upland owners is reciprocal: any loss experienced by one is a gain made by the other,* and it would be inherently unfair to the tideland owner to privilege the forces of accretion over those of erosion. Indeed, the fairness rationale underlying courts' *adoption of the rule of accretion assumes that uplands already are subject to erosion for which the owner otherwise has no remedy.*

Id. at 1188 (emphases added). *Milner* thus concluded that because the "Lummi have a vested right to the ambulatory boundary and to the tidelands they would gain if the boundary were allowed to ambulate, the [h]omeowners [did] not have the right to permanently fix the property boundary absent consent from the United States or the Lummi Nation." *Id.* at 1189-90. That court further stated, "[t]he Lummi similarly could not erect structures on the tidelands that would

permanently fix the boundary and prevent accretion benefitting the [h]omeowners." *Id.* at 1190.

On the other hand, the State points to another Ninth Circuit case, *Western Pac. Ry. Co. v. Southern Pac. Co.*, 151 F. 376 (9th Cir. 1907), which it asserts reaches the opposite conclusion.[16] The *Western Pac.* court rejected the argument that there could be a vested right in future accretion. *Id.* at 399. That court stated that under the definition of a vested right set forth in *Pearsall, supra*, "there can be no question, . . . that the right to future possible accretion could be divested by legislative action." *Id.* That court further stated that "*[t]o say that one who acquires from the state title to tide lands acquires therewith a vested right to all possible future accretion is to impose a restriction on the power of the state to occupy or improve for the public benefit the adjacent submerged lands.*" *Id.* (emphasis added). While recognizing that *Lovingston*, 90 U.S. 46, stated that the riparian right of future accretions is a vested right, the *Western Pac.* court stated "*we are unable to see how one can have a present vested right to that which does not exist, and which may never have an existence.*" *Id.* (emphasis added).

Insofar as those cases are arguably in conflict, those cases are not binding on this court as they did

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[16] The ICA also relied on this case in support of its conclusion that Plaintiffs did not have a vested right in future accretion.

not involve constitutional considerations. Furthermore, while *Milner* and *Lovingston* stated that the riparian right to future alluvion is a vested right, that right is limited to the context of those cases. In those cases, the riparian or littoral owner had a vested right to future accretions insofar as they owned accreted lands under common law. So long as they owned those accretions under common law, any future accretion was arguably vested. Under the rationale employed in *Lovingston*, 90 U.S. at 68-69, and *Milner*, 583 F.3d at 1187-88, if the right to future alluvion or accretion is similar to the "the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase," once the State is required to pay just compensation for all land which was not registered or to which title was not quieted as of the effective date of Act 73, the State is the owner of the accreted land to which future accretions will form, not the littoral owner. Moreover, post-Act 73, it is the State that has a vested right to future accretions as the owner of the lands to which those future accretions will attach. By analogy, the State is the owner of the tree and its fruits, or the owner of the flocks and herds along with their natural increase.

Under Plaintiffs' interpretation of vested rights, one who sells their tree continues to maintain a vested right in the fruit of that tree. Clearly, once the State became the owner of the accreted lands as of the effective date of Act 73, the littoral owners' ownership right to accretion and future accretion was effectively cut off. The ICA stated that "Plaintiffs and

the class they represented had no vested property rights to *future accretions* to their oceanfront land and, therefore, Act 73 did not effect an uncompensated taking of future accretions[.]" *Maunalua Bay*, 122 Hawai'i at 57, 222 P.3d at 464. The ICA's opinion should be clarified to establish that inasmuch as Plaintiffs' have no vested right to future accretion, Plaintiffs had no ownership interest in any lands which accreted after the effective date of Act 73.

Additionally, on appeal, Plaintiffs did not cite to *Milner*, 583 F.3d at 1174, in connection with its argument that Plaintiffs have a vested right in future accretions. Plaintiffs did however, rely on *Lovingston*, 90 U.S. at 46, from which the above-stated quoted language in *Milner* is derived. Notably, the ICA addressed *Lovingston* only insofar as *Western Pac.*, 151 F.3d at 376, rejected that quote as mere dictum. *See Maunalua Bay*, 122 Hawai'i at 53, 222 P.3d at 460. The foregoing analysis indicates that although *Milner* and *Lovingston* state that the right to future alluvion is a vested right, *see supra*, Plaintiffs' reliance on that language is misplaced. Thus, assuming *arguendo* that this court were bound by the Supreme Court's decision in *Lovingston*, that case does not support Plaintiffs' position that the right to future accretion is a vested right. The ICA's failure to further explore the applicability of the Supreme Court's *Lovingston* decision serves as another reason for granting certiorari in this case.

C.

Briefly stated, in holding that Plaintiffs have no vested right in future accretions, the ICA said that "article XI, section 1 of the Hawai'i State Constitution . . . clearly diminishes any expectation that ocean-front owners in Hawai'i had and may have in future accretions to their property." *Id.* at 5354, 222 P.3d at 463-64. Plaintiffs contend that the ICA's suggestions is both wrong and legally irrelevant. Plaintiffs maintain that the ICA's suggestion is (1) wrong in light of the fact that *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), "makes clear that those who buy land after an uncompensated taking still have the right to compensation[,]" and (2) irrelevant because "the law regarding seaward boundaries and property right predated the adoption of the Hawaii State Constitution in 1978." (Bolded emphasis and citation omitted.) According to Plaintiffs, "[l]ater adopted laws do not weaken [Plaintiffs'] property rights." (Citations omitted.) Thus, "[i]n assessing the landowners vested rights, the fact Hawaii chose to constitutionalize [the public trust doctrine] in 1978 cannot affect pre-existing land boundaries."

The ICA's reference to "article XI, section 1 of the Hawai'i State Constitution" was not dispositive to its determination that Plaintiffs had no vested right in future accretion. In fact, that provision of the Constitution is irrelevant, not for the reason suggested by Plaintiffs, but because the littoral owners' expectations in future accretion is speculative for purposes of determining whether such owners had a vested

interest in future accretion in this case. Once the ICA determined that Plaintiffs had no vested right in future accretions, the ICA's inquiry as to whether Act 73 effected a taking as to those lands should have ended there. The ICA's opinion should be clarified in this regard.

X.

A.

With respect to the fourth question presented in Plaintiffs' application regarding the denial of their request for attorney's fees, "[t]his court 'reviews the denial and granting of attorney's fees under the abuse of discretion standard.'" *Abastillas v. Kekona*, 87 Hawai'i 446, 449, 958 P.2d 1136, 1139 (1998) (quoting *Eastman v. McGowan*, 86 Hawai'i 21, 27, 946 P.2d 1317, 1323 (1997) (brackets and ellipsis omitted)). This court has recognized the private attorney general doctrine as an exception to this general or "American Rule" that "each party is responsible for paying his or her own litigation expenses." *Sierra Club v. Dep't of Transp. of State of Hawai'i*, 120 Hawai'i 181, 218, 202 P.3d 1226, 1263 (2009).

The private attorney general doctrine "is an equitable rule that allows courts *in their discretion* to award attorney's fees to plaintiffs who have *vindicated important public rights*." *Id.* (internal quotation marks, brackets and citations omitted) (emphases added). Three factors are considered in determining whether the doctrine should apply "(1) the strength or

societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, [sic] (3) the number of people standing to benefit from the decision." *Id.* (bracketed text in original).

The first prong of the three-prong test requires this court to consider the strength or importance of the public policy vindicated by the litigation. As indicated however, the doctrine is an equitable rule that allows courts in their discretion to award attorney's fees to plaintiffs who have *vindicated important public rights*." *Id.* (internal quotation marks and citations omitted) (emphasis added). Although one's right to just compensation where the government has taken private property for public use is protected by Article I, Section 20 of Hawaii's Constitution, in asserting that right, plaintiffs necessarily seek to vindicate the right of the *private property owner* to just compensation. The very nature of a takings claims protects the interest of the *private* party or parties from whom the State has taken property. However, Plaintiffs arguably vindicated a public policy by establishing that Act 73 effected a taking. Plaintiffs correctly point out that the right to just compensation where the State "takes" private property for public use, is protected by the Hawai'i State Constitution. *See* Haw. Const. art I, § 20. Under circumstances where private and public interests are arguably equipoised, Plaintiffs' application should be granted as to its fourth question.

B.

With regard, to Plaintiffs' request for costs, Plaintiffs argue that they are the prevailing party on the predominant issue. The ICA either abused its discretion in denying costs, or alternatively, because the ICA denied Plaintiffs costs without any explanation, its denial must be clarified to establish that it did not abuse its discretion in denying costs.

XI.

Briefly noted, the second question raised in Plaintiffs' Application is whether the ICA erred in criticizing class certification when that issue was not on appeal. As acknowledged by the ICA, class certification was not challenged on appeal, and therefore, any comment regarding class certification was dictum. *See Black's Law Dictionary* at 1177 (defining "obiter dictum" as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential"). Inasmuch as this case is in the middle of trial, and the court may rely on the ICA's comments which amount to dicta, the ICA's opinion should be clarified in that regard as the comments do not establish the law of the case.

Moreover, the instant case is an interlocutory appeal. Because then, the class certification order was not made final and not appealed, the ICA's comments regarding the propriety of class certification were tantamount to an advisory opinion. It is

axiomatic, that "'courts are to avoid advisory opinions on abstract propositions of law.'" *Kona Old Hawaiian Trails Group v. Lyman*, 69 Haw. 81, 87, 734 P.2d 161, 165 (1987) (quoting *Hall v. Beals*, 396 U.S. 45, 48 (1969) (brackets omitted)). Plaintiffs' application should be granted as to their second question and the ICA's opinion should be modified accordingly.

XII.

Plaintiffs' third question is whether the ICA gravely erred in misstating the record regarding Plaintiffs' ownership rights in accreted land. The ICA stated:

> *Notably absent from Plaintiffs' complaint is any allegation that Plaintiffs have ownership rights in accreted lands that existed at the time Act 73 was enacted.* Moreover, the deeds by which Plaintiffs acquired the beach-reserve lots suggest that there were seawalls built on the lots, raising questions concerning the existence of any accretions. Because *Plaintiffs have not alleged specific accretions which the State has taken from them by the enactment of Act 73 and, more damagingly, have not alleged that any accreted land even exists, the circuit court, on remand, must determine whether Plaintiffs have been injured by the enactment of Act 73.*

Maunalua Bay, 122 Hawai'i 56-57, 222 P.3d 463-64 (emphases added). Plaintiffs argue that (1) the evidence regarding ownership goes to damages as opposed to

liability, (2) the record indicates that Plaintiffs advised the court that witnesses would testify on their behalf regarding the amount and value of the property "taken" by Act 73, and (3) conveyance documents indicate that accreted lands were conveyed to Plaintiffs.

Like the ICA's comments regarding the propriety of class certification, the issue as to whether Plaintiffs' alleged any ownership rights in accreted lands which existed at the time Act 73 was enacted was not raised on appeal. Therefore, the ICA's comments regarding Plaintiffs' ownership rights in accreted land were dicta. *See supra.* Plaintiffs' application should be granted as to their third question because the ICA erred in commenting on issues not before it on appeal. Thus, the ICA's opinion should be modified accordingly.

XIII.

Based on the foregoing, I would accept both the Plaintiffs' and the State's Applications.

HB192 CD1.txt

HB192 CD1Report Title:
Accreted Lands
Description:

Defines accreted lands. Includes accreted lands in the definition of public lands. Requires that accreted lands shall be state lands except a private property owner may file an accretion claim to regain title to the owner's eroded land that has been restored by accretion. Clarifies that the applicant provides the notice for publication in OEQC's periodic bulletin. (HB192 CD1)

H.B. NO.192
HOUSE OF REPRESENTATIVESH.D. 1
TWENTY-SECOND LEGISLATURE, 2003S.D. 1
STATE OF HAWAIIC.D. 1

A BILL FOR AN ACT

RELATING TO ACCRETED LANDS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Section 171-1, Hawaii Revised Statutes, is amended by adding a new definition to be appropriately inserted and to read as follows:

""Accreted lands" means lands formed by the gradual accumulation of land on a beach or shore along the ocean by the action of natural forces."

SECTION 2. Section 171-2, Hawaii Revised Statutes, is amended to read as follows:

"§171-2 Definition of public lands. "Public lands" means all lands or interest therein in the State classed as government or crown lands previous to August 15, 1895, or acquired or reserved by the government upon or subsequent to that date by purchase, exchange, escheat, or the exercise of the right of eminent domain, or in any other manner; including accreted lands not otherwise awarded, submerged lands, and lands beneath tidal waters which are suitable for reclamation, together with reclaimed lands which have been given the status of public lands under this chapter, except:

(1) Lands designated in section 203 of the Hawaiian Homes Commission Act, 1920, as amended;

(2) Lands set aside pursuant to law for the use of the United States;

(3) Lands being used for roads and streets;

(4) Lands to which the United States relinquished the absolute fee and ownership under section 91 of the Hawaiian Organic Act prior to the admission of Hawaii as a state of the United States unless subsequently placed under the control of the board of land and natural resources and given the status of public lands in accordance with the State Constitution, the Hawaiian Homes Commission Act, 1920, as amended, or other laws;

(5) Lands to which the University of Hawaii holds title;

(6) Lands to which the housing and community development corporation of Hawaii in its corporate capacity holds title;

(7) Lands to which the Hawaii community development authority in its corporate capacity holds title;

(8) Lands to which the department of agriculture holds title by way of foreclosure, voluntary surrender, or otherwise, to recover moneys loaned or to recover debts otherwise owed the department under chapter 167;

(9) Lands which are set aside by the governor to the Aloha Tower development corporation; lands leased to the Aloha Tower development corporation by any department or agency of the State; or lands to which the Aloha Tower development corporation holds title in its corporate capacity; and

(10) Lands to which the agribusiness development corporation in its corporate capacity holds title."

SECTION 3. Section 343-3, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

"(c) The office shall inform the public of:

(1) A public comment process or public hearing if a federal agency provides for the public comment process or public hearing to process a habitat conservation plan, safe harbor agreement, or incidental take

license pursuant to the federal Endangered Species Act;

(2) A proposed habitat conservation plan or proposed safe harbor agreement, and availability for inspection of the proposed agreement, plan, and application to enter into a planning process for the preparation and implementation of the habitat conservation plan for public review and comment; [and]

(3) A proposed incidental take license as part of a habitat conservation plan or safe harbor agreement[.]; and

(4) An application for the registration of land by accretion pursuant to section 501-33 or 669-1(e) for any land accreted along the ocean."

SECTION 4. Section 501-33, Hawaii Revised Statutes, is amended to read as follows:

"§501-33 Accretion to land. An applicant for registration of land by accretion shall prove by a preponderance of the evidence that the accretion is natural and permanent[.]; provided that no applicant other than the State shall register land accreted along the ocean, except that a private property owner whose eroded land has been restored by accretion may file an accretion claim to regain title to the restored portion. The applicant shall supply the office of environmental quality control with notice of the application, for publication in the office's periodic bulletin in compliance with section 343-3(c)(4). The application shall not be approved unless the office of environmental

quality control has published notice in the office's periodic bulletin.

[~~"Permanent"~~] As used in this section, "permanent" means that the accretion has been in existence for at least twenty years. The accreted portion of the land shall be state land except as otherwise provided in this section and shall be considered within the conservation district [~~unless designated otherwise by the land use commission under chapter 205~~]. Prohibited uses are governed by section 183-45."

SECTION 5. Section 669-1, Hawaii Revised Statutes, is amended by amending subsection (e) to read as follows:

"(e) Action may be brought by any person to quiet title to land by accretion[~~.~~]; provided that no action shall be brought by any person other than the State to quiet title to land accreted along the ocean, except that a private property owner whose eroded land has been restored by accretion may also bring such an action for the restored portion. The person bringing the action shall prove by a preponderance of the evidence that the accretion is natural and permanent. The person bringing the action shall supply the office of environmental quality control with notice of the action for publication in the office's periodic bulletin in compliance with section 343-3(c)(4). The quiet title action shall not be decided by the court unless the office of environmental quality control has properly published notice of the action in the office's periodic bulletin.

["Permanent"] As used in this section, "permanent" means that the accretion has been in existence for at least twenty years. The accreted portion of land shall be state land except as otherwise provided in this section and shall be considered within the conservation district [unless designated otherwise by the land use commission under chapter 205]. Prohibited uses are governed by section 183-45."

SECTION 6. Applications for the registration of land by accretion and actions to quiet title to land by accretion pending at the time of the effective date of this Act shall be processed under the law existing at the time the applications and actions were filed with the court. Applications for the registration of land by accretion and actions to quiet title to land by accretion filed subsequent to the effective date of this Act shall be processed in accordance with this Act.

SECTION 7. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 8. This Act shall take effect upon its approval.

Hawai'i Revised Statutes Chapter 171
Public Lands, Management and Disposition of

§171-2. **Definition of public lands.** (emphasis added)

Public lands means all lands or interest therein in the State classed as government or crown lands previous to August 15, 1895, or acquired or reserved by the government upon or subsequent to that date by purchase, exchange, escheat, or the exercise of the right of eminent domain, or in any other manner; **including accreted lands not otherwise awarded**, submerged lands, and lands beneath tidal waters which are suitable for reclamation, together with reclaimed lands which have been given the status of public lands under this chapter, except:

(1) Lands designated in section 203 of the Hawaiian Homes Commission Act, 1920, as amended;

(2) Lands set aside pursuant to law for the use of the United States;

(3) Lands being used for roads and streets;

(4) Lands to which the United States relinquished the absolute fee and ownership under section 91 of the Hawaiian Organic Act prior to the admission of Hawaii as a state of the United States unless subsequently placed under the control of the board of land and natural resources and given the status of public lands in accordance with the State Constitution, the Hawaiian Homes Commission Act, 1920, as amended, or other laws;

(5) Lands to which the University of Hawaii holds title;

(6) Lands to which the Hawaii housing finance and development corporation in its corporate capacity holds title;

(7) Lands to which the Hawaii housing finance and development corporation in its corporate capacity holds title;

(8) Lands to which the department of agriculture holds title by way of foreclosure, voluntary surrender, or otherwise, to recover moneys loaned or to recover debts otherwise owed the department under chapter 167;

(9) Lands which are set aside by the governor to the Aloha Tower development corporation; lands leased to the Aloha Tower development corporation by any department or agency of the State; or lands to which the Aloha Tower development corporation holds title in its corporate capacity;

(10) Lands which are set aside by the governor to the agribusiness development corporation; lands leased to the agribusiness development corporation by any department or agency of the State; or lands to which the agribusiness development corporation in its corporate capacity holds title; and

(11) Lands to which the high technology development corporation in its corporate capacity holds title.

Hawai'i Revised Statutes Chapter 501
Land Court

§501-33. Accretion to land. (emphasis added)

An applicant for registration of land by accretion shall prove by a preponderance of the evidence that the accretion is natural and permanent; provided that no applicant other than the State shall register land accreted along the ocean, except that a private property owner whose eroded land has been restored by accretion may file an accretion claim to regain title to the restored portion. The applicant shall supply the office of environmental quality control with notice of the application, for publication in the office's periodic bulletin in compliance with section 343-3(c)(4). The application shall not be approved unless the office of environmental quality control has published notice in the office's periodic bulletin.

As used in this section, permanent means that the accretion has been in existence for at least twenty years. The accreted portion of the land shall be state land except as otherwise provided in this section and shall be considered within the conservation district. Prohibited uses are governed by section 183-45.

Hawai'i Revised Statutes, Chapter 669
Quieting Title

§669-1. Object of action. (emphasis added)

(a) Action may be brought by any person against another person who claims, or who may claim

adversely to the plaintiff, an estate or interest in real property, for the purpose of determining the adverse claim.

(b) Action for the purpose of establishing title to a parcel of real property of five acres or less may be brought by any person who has been in adverse possession of the real property for not less than twenty years. Action for the purpose of establishing title to a parcel of real property of greater than five acres may be brought by any person who had been in adverse possession of the real property for not less than twenty years prior to November 7, 1978, or for not less than earlier applicable time periods of adverse possession. For purposes of this section, any person claiming title by adverse possession shall show that such person acted in good faith. Good faith means that, under all the facts and circumstances, a reasonable person would believe that the person has an interest in title to the lands in question and such belief is based on inheritance, a written instrument of conveyance, or the judgment of a court of competent jurisdiction.

(c) Action brought to claim property of five acres or less on the basis of adverse possession may be asserted in good faith by any person not more than once in twenty years, after November 7, 1978.

(d) Action under subsection (a) or (b) shall be brought in the circuit court of the circuit in which the property is situated.

(e) Action may be brought by any person to quiet title to land by accretion; provided that **no action shall be brought by any person other than the State to quiet title to land accreted along the ocean, except that a private property owner whose eroded land has been restored by accretion may also bring such an action for the restored portion**. The person bringing the action shall prove by a preponderance of the evidence that the accretion is natural and permanent. The person bringing the action shall supply the office of environmental quality control with notice of the action for publication in the office's periodic bulletin in compliance with section 343-3(c)(4). The quiet title action shall not be decided by the court unless the office of environmental quality control has properly published notice of the action in the office's periodic bulletin. As used in this section, permanent means that the accretion has been in existence for at least twenty years. The accreted portion of land shall be state land except as otherwise provided in this section and shall be considered within the conservation district. Prohibited uses are governed by section 183-45.

Supreme Court, U.S.
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No. 10-331

In the

Supreme Court of the United States

MAUNALUA BAY BEACH OHANA 28, a Hawaii Nonprofit Corporation; MAUNALUA BAY BEACH OHANA 29, a Hawaii Nonprofit Corporation; and MAUNALUA BAY BEACH OHANA 38, a Hawaii Nonprofit Corporation, individually and on behalf of all others similarly situated,

Petitioners,

v.

STATE OF HAWAII,

Respondent.

On Petition for Writ of Certiorari to the Intermediate Court of Appeals of the State of Hawaii

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND THE CATO INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

For nearly 120 years, littoral owners in Hawaii held riparian rights to accretion and direct ocean access: their oceanward boundaries moved as beaches accreted and eroded. In 2003, Hawaii adopted a statute--Act 73--that, effective immediately, changed both existing and future oceanfront accretions throughout the state into "public lands." Act 73 fixed oceanfront boundaries forever and, as a result, littoral owners lost both existing accretion and their riparian rights. In 2010, the Hawaii Intermediate Court of Appeals ruled that the State owed just compensation only for accretion that existed in 2003. It also held, however, that the State could take the rights to a shoreline boundary and future accretion because littoral owners' riparian rights were only contingent interests in future accretion and thus were not "property"for takings purposes. That holding directly conflicts with this Court's decisions regarding the nature of riparian rights.

The question presented here is:

> Since this Court has recognized riparian rights are vested property interests, can Hawaii take those rights, including future accretion, without violating federal constitutional protections?

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) and the Cato Institute respectfully submit this brief amicus curiae in support of Petitioner Maunalua Bay Beach Ohana 28, et al.[1]

PLF was founded over 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has participated in numerous cases before this Court both as counsel for parties and as amicus curiae. PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts, and represent the views of thousands of supporters nationwide who believe in limited government and property rights.

PLF represented property owners in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). PLF also participated as *amicus curiae* in cases before this Court, including *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 130 S. Ct. 2592 (2010), *Kelo v. City of New London*, 545 U.S. 469 (2005), and *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229

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[1] Pursuant to this Court's Rule 37, all parties have received timely notice of *amici's* intention to file this brief and have consented thereto. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37(6), *amici curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

(1984). PLF attorneys appeared as amicus curiae in both the Hawaii Intermediate Court of Appeals and the Hawaii Supreme Court in support of Petitioners. *Maunalua Bay Beach Ohana 28 v. State of Hawaii*, 222 P.3d 441 (Haw. Ct. App. 2009) (petition for writ of certiorari denied in *Maunalua Bay Beach Ohana 28 v. State of Hawaii*, 2010 Haw. LEXIS 119 (2010)).

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs.

Because of their experience with regard to property rights and, specifically, the constitutional limits on eminent domain, PLF and Cato believe their perspective will aid the Court in considering this petition.

SUMMARY OF ARGUMENT

This case raises serious questions about whether Hawaii has effectively extinguished littoral landowners' rights to accretion, as recognized at common law, and, if so, whether the affected landowners have a federal constitutional claim for relief.

Here, the Hawaii Intermediate Court of Appeals upheld a Hawaii statute (Act 73) as it applies to littoral landowners' rights to *future* accretions. *Maunalua Bay Beach Ohana 28 v. State of Hawaii*, 222 P.3d 441, 464

(Haw. Ct. App. 2009). The Hawaii court distinguished between accreted lands in existence at the time of the Act's passage (which the legislature could not take without compensation) and future accretion of land (which it could). *Id.* at 459-61. In contrast to this Court's decisions and the views expressed by courts in other jurisdictions, the Hawaii court concluded that the right to future accretion was contingent and speculative, and therefore not a vested right whose elimination could support a claim for relief against the state. *Id.*

The petition in this case asks whether, in light of this Court's recognition of littoral rights as unqualifiedly vested property interests entitled to protection, federal constitutional principles prevent Hawaii from extinguishing those rights without notice, without a hearing, and without compensation. Even in the wake of this Court's decision in *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 130 S. Ct. 2592 (2010), the answer is far from clear.

In *Stop the Beach*, petitioner claimed that the Florida Supreme Court's decision upholding a state law providing for the artificial replenishment of beaches,--and the consequent extinction of future accretion rights--departed so drastically from Florida common-law principles of littoral rights that the decision effected a taking. Without answering the question of whether a viable taking claim might exist *if* such a departure from the common law had occurred, this Court held that, because Florida common-law principles had not actually been disturbed, there could be no taking. *Id.* at 2613.

Although no opinion in *Stop the Beach* commanded a majority, six justices, nevertheless

offered their views on the kind of constitutional protection that might be afforded to littoral landowners who are subjected to a sudden break with common-law principles of property rights. Four justices were of the view that such a departure would effect a compensable taking, while two justices were of the view that it would implicate substantive due process rights. *Id.* at 2601-02 (Scalia, J., joined by Roberts, C. J., and Thomas and Alioto, J. J.), 2614 (Kennedy, J., joined by Sotomayer, J.). The remaining two justices expressed no opinion on this issue because they felt it need not be reached to resolve the case. *Id.* at 2618 (Brever, J., joined by Ginsburg, J.). But, again, on the fundamental issue of the existence and nature of a federal constitutional claim *if* a state drastically departs from settled common law principles, the Court's decision unfortunately offered little guidance to states and little assurance to property owners.

This case provides a clearer example of a state's dramatic departure from common-law principles than in others, including *Stop the Beach*. Hawaii's clean break with the state common-law protections for littoral rights is difficult to deny. Thus, this petition offers the Court an opportunity to squarely address the important federal question of the type of claim and remedy victimized property owners might have under these circumstances.

This area of constitutional law is shrouded in confusion, impacting property owners nationwide as emboldened states embrace sudden and drastic changes in common-law principles of property rights. The legal issues at stake here have national implications. Examples of other impacted jurisdictions include Ohio and Oregon, whose landowners have been

grappling with the constitutional implications of threatened and actual departures from settled protections of their rights. For these reasons, the Court should grant the petition.

REASONS FOR GRANTING THE WRIT

I

THE COURT HAS NOT RESOLVED THE QUESTION OF WHETHER STATE DEPARTURES FROM LONG-ESTABLISHED PROPERTY RIGHTS ARE ACTIONABLE UNDER THE U.S. CONSTITUTION

The Fourteenth Amendment to the U.S. Constitution, incorporating the Fifth Amendment's protections, forbids states from taking private property for public use without just compensation. *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 242-43 (1897). "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005). But the government may also take private property through acts and decisions that affect property rights and interests. *Id.*

In *Lucas v. S. C. Coastal Council*, 505 U.S. 1003 (1992), this Court held that a regulation depriving an owner of "all economically beneficial use" of his property effects a taking. *Id.* at 1029. The Court discussed how background principles of state law help determine when a taking has occurred. *Id.* According to the Court, an owner is lawfully barred from using land in a way that is traditionally proscribed by "existing rules or understandings," as reflected in state

law. *Id.* at 1030. But if a regulation extinguishes a well-established, permissive use of land, it may effect a compensable taking. *Id.* As discussed more fully below, four justices of this Court recently expressed the view that a judicial decision, as well as legislative and administrative regulations, may effect a taking if that decision drastically departs from traditional and well-established state rules protecting property rights. *Stop the Beach*, 130 S. Ct. at 2601.

The Fourteenth Amendment's Due Process Clause also acts as a barrier against government acts and decisions that take established property rights. As two justices of this Court recently opined with respect to the theory that a judicial decision violates that constitutional provision, "[t]he Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is 'arbitrary and irrational' under the Due Process Clause." *Id.* at 2615 (Kennedy and Sotomayor, JJ., concurring).

In light of these background legal principles and theories, this case raises the question of whether the sudden elimination of well-established, common-law property rights--like Petitioners' right to future accretion--gives rise to a cognizable taking or due process claim under the Fifth and Fourteenth Amendments. The question is significant particularly for those landowners, like Petitioners in Hawaii, whose littoral property rights continue to be at greatest risk of sudden modification or elimination.[2]

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[2] "Littoral" property abuts a sea or lake, while "riparian" property abuts a river. There is no relevant difference between the terms

(continued...)

Generally, "state law defines property interests." *Stop the Beach*, 130 S. Ct. at 2597 (quoting *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998)). This includes littoral rights--the rights of shoreline owners of property directly abutting a lake or sea. *Id.* at 2597-98. For littoral properties, state law defines the nature and extent of owners' rights in navigable waters and the lands underneath them. *Id.* For at least120 years, Hawaii has had well-established common-law rules concerning littoral rights.

Under Hawaii common law before 2003--when Act 73 was enacted--the State owned the land from under the water to the highwater mark, and the littoral landowner owned the land "along the upper reaches of the wash of waves." *In re Ashford*, 440 P.2d 76, 77 (Haw. 1968). As the highwater mark moved, so did the littoral landowner's property line: The owner lost land to erosion, but gained land to accretion, without qualification.[3] *Halstead v.* Gay, 7 Haw. 587, 590 (1889); *County of Hawaii v. Sotomura*, 517 P.2d 57, 61 (Haw. 1973). All the while, direct littoral access to the water would be preserved--advancing an important goal of the erosion-and-accretion doctrine. *State v. Zimring*, 566 P.2d 725, 734 (Haw. 1977) ("[T]he accretion doctrine is founded on the public policy that littoral access should be preserved where possible

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[2] (...continued)
"littoral" and "riparian" in this context. *See* Joseph L. Sax, *Changing Currents: Perspectives on the State of Water Law and Policy in the 21st Century: The Accretion/Avulsion Puzzle: Its Past Revealed, Its Future Proposed*, 23 Tul. Envt'l L. J. 305, 367 n.3 (2010).

[3] Accretion is the process by which the gradual deposit of soil due to the action of tidal waters increases the abutting area of land.

. . . ."). Before Act 73, littoral landowners could formally assert ownership in accreted lands by registering them with the State or bringing a quiet-title action. They had relied on the common law's recognition of the accretion doctrine for *120 years*.

Act 73 suddenly and dramatically up-ended these common-law principles, transferring to the State the benefits of both erosion *and* accretion, without notice, hearing, or compensation to affected littoral owners. Under the Act, not only does the State acquire land through erosion, but it also acquires land through accretion. And, with very limited exceptions, only the State may register or quiet title to accreted lands. The Hawaii Intermediate Court of Appeals held that the law violated federal and state takings and due process protections with respect to accreted lands existing at the time of the law's enactment. But the court upheld the Act with respect to *future accretions*.

The problem with the Hawaii decision is that the distinction between present and future accretions has no support in the state's common or constitutional law, or in this Court's federal constitutional jurisprudence. For example, as this Court made clear in *Cal. ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 284 (1982), "the right to future accretions is an inherent and essential attribute of the littoral or riparian owner." *See also County of St. Clair v. Lovingston*, 90 U.S. 46, 68-69 (1874) ("The riparian right to *future* alluvion is a vested right" and "an inherent and essential attribute of the original property"--a right that is not granted (and therefore rescindable) by the government, but "rest[ing] in the

law of nature;"[4] *United States v. Milner*, 583 F.3d 1174, 1187 (9th Cir. 2009) (citing *County of St. Clair* for the proposition that littoral landowners have "a vested right in the potential gains that accrue from the movement of the boundary line"). As this Court has explained, any rule other than the right of the littoral owner to future accretion "would leave [littoral] owners continually in danger of losing the access to water which is often the most valuable feature of their property, and continually vulnerable to harassing litigation challenging the location of the original water lines." *Hughes v. Washington*, 389 U.S. 290, 293-94 (1967); *see also Ely v. Briley*, 959 S.W.2d 723, 727 (Tex. App. 1998) ("[T]he right to increase by accretion is part of the bundle of riparian property rights . . . ."); Sax, *supra*, at 306 ("[T]he accretion rule accords with our contemporary view that water-adjacency is a primary value of private littoral/riparian titles. . . .").

If Hawaii has in fact eliminated littoral landowners' right to accretion, the unresolved question is whether--and under what theory--affected landowners may have a federal constitutional claim for relief. As alluded to above, this Court's decision in *Stop the Beach suggests* that at least six justices believe that such a claim is available, though on different theories.

Like this case, *Stop the Beach* involved littoral landowners' right to accretion. *Stop the Beach*, 130 S. Ct. 2598. Pursuant to Florida law, a Florida city sought to reclaim privately owned beaches from advancing tides by pouring sand where the beaches had eroded away. Before they eroded, the beaches

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[4] The term "alluvion" and "accretion" are used interchangeably. Black's Law Dictionary (6th ed.) at 77.

were private property; but after the city poured sand to "undo" the erosion, public officials declared the "re-created" beaches to be public, from which beachfront property owners had no right to exclude anyone. *Id.* at 2599-2600.

Property owners challenged the Florida law, which they argued effected a taking. The property owners prevailed in their challenge before the State Court of Appeal, but the Florida Supreme Court overturned that decision and ruled against them. *Id.* at 2600. The owners appealed to this Court, arguing that the Florida Supreme Court, by eliminating important common-law rights and changing the definition of waterfront property, effected a "judicial taking" under the Fifth and Fourteenth Amendments. *Id.* at 2600-01.

While this Court unanimously affirmed the Florida Supreme Court's decision--holding that the state court had not eliminated common-law rights--*id.* 2613--it did not reach the question of the viability of a judicial taking claim. Nevertheless, six of the eight justices who participated in the decision opined as to the kind of constitutional claim that might be available to a property owner who sees his common-law rights extinguished.

Chief Justice Roberts and Justices Scalia, Thomas, and Alito endorsed the plaintiffs' judicial taking theory. *Id.* at 2601 (Scalia, J., writing for the plurality). In their view, the Court's precedents "provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary." *Id.* "[T]he Takings Clause bars *the State* from taking

private property without paying for it, no matter which branch is the instrument of the taking." *Id.* 2602.

Justices Kennedy and Sotomayor agreed that property owners subjected to the sudden elimination of their established property rights have a federal constitutional claim. But they disagreed as to the constitutional theory supporting that claim, concluding that "[i]f a judicial decision, as opposed to an act of the executive or the legislature, eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law." *Id.* at 2614.

Unfortunately, the Court was unable to render a definitive holding in *Stop the Beach* as to the nature of a claim for a state's sudden elimination of long-established property rights--but only because Florida's impact on littoral rights evidently did not rise to a sufficient level of conflict with the state's common law. Here, in contrast, Hawaii has *entirely* stripped *all* littoral property owners of their right to future accretions, producing a conflict with those owners' settled, common-law expectations that is far clearer than the alleged Florida conflict.

II

RESOLVING THE CONSTITUTIONAL IMPLICATIONS OF STATE ABROGATION OF COMMON-LAW PROTECTIONS FOR LITTORAL AND OTHER PROPERTY RIGHTS WILL HAVE A NATIONWIDE IMPACT

The problem of state elimination of common-law property rights--especially by judicial fiat--is not unique to Hawaii. The absence of a federal judicial

takings doctrine has encouraged other state legislatures to restrict property rights--often an unpopular practice--indirectly, by shifting the issue to politically insulated courts. If legislators or their favored interests desire land, they know precisely what to do: avoid changing defined property rights in a way that constitutes a taking and instead wait for the courts to subtly redefine those rights when a property owner inevitably challenges a particular state action. Ilya Shapiro & Trevor Burrus, *Judicial Takings and Scalia's Shifting Sands*, 35 Vt. L. Rev. (forthcoming), *available at* http://ssrn.com/abstract=1652293 (last visited Oct. 8, 2010).

Writing in the Virginia Law Review in 1990, Barton H. Thompson, Jr., authored what is widely recognized as the "seminal article on the judicial takings problem." W. David Sarratt, *Judicial Takings and the Courts Pursued*, 90 Va. L. Rev. 1487, 1494 (2004). Arguing that state courts were too eager, and too able, to take private property without repercussions, Thompson noted that

> [c]ourts have the doctrinal tools to undertake many of the actions that legislatures and executive agencies are constitutionally barred from pursuing under the takings protections--and pressure is mounting for courts to use these tools. Indeed, while paying lip service to stare decisis, the courts on numerous occasions have reshaped property law in ways that sharply constrict previously recognized private interests. Faced by growing environmental, conservationist, and recreational demands, for example, state courts have recently begun

> redefining a variety of property interests to increase public or governmental rights, concomitantly shrinking the sphere of private dominion.

Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449, 1451 (1990).

Sometimes legislatures are successful at recruiting the courts to do their bidding in redefining or eliminating common-law protections of property rights; other times, they are not.

In *State ex rel. Thornton v. Hay*,462 P.2d 671 (Or. 1969), for example, the Oregon Supreme Court entertained a lawsuit from the owner of private dry-sand beach property who sought to enclose his property. *Id.* at 672. The legislature had passed a bill that was a masterpiece of equivocation: It established a "policy" that the state had an exclusive right, through "dedication, prescription, grant or otherwise," to all "ocean shore" property, regardless of private ownership of upland dry-sand areas. Or. Rev. Stat. § 390.610. But fear of taking claims kept the legislature from turning its legislation into an outright binding law, instead characterizing it as a sort of glorified guideline.

In *Thornton*, the state argued that, because of constitutional protections against uncompensated takings, the statute at issue did not actually divest landowners of their property. Instead, it merely "codifie[d] a policy favoring the acquisition by prescription of public recreational easement in beach lands" as authority for the court to restrict the private owners' property rights. *Thornton*, 462 P.2d at 676. In other words, it was a policy that was not quite a law but still should be enforced like a law. The Oregon

Supreme Court exploited this legerdemain, construing the "enacted policy" as a law and effectively absolving the legislature of responsibility for its taking. *Id.* at 678. *Thornton* thus showed that, in the absence of a judicial takings doctrine (or the equivalent under substantive due process or other theory), legislators will use the path of least resistance--the courts--to accomplish policy goals that the Takings Clause would otherwise block.

Oregon again exploited this legislative "loophole" in *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994). In *Stevens*, beachfront owners sought a permit to erect a seawall on their portion of the beach. Using the *Lucas* framework, the Oregon Supreme Court held that the private owners had no property right superior to the public's right of access to the beach. *Id.* at 454. Dissenting from the denial of certiorari, Justice Scalia, joined by Justice O'Connor, recognized that *Lucas* needed to be clarified in order to avoid these "judicial slights-of-hand," Shapiro & Burrus, *supra*: "Our opinion in *Lucas*, for example, would be a nullity if anything that a state court chooses to denominate 'background law'--regardless of whether it is really such--could eliminate property rights." *Stevens*, 510 U.S. at 1334 (Scalia, J., dissenting from denial of cert.).

Landowners in other cases involving similar threats to the judicial elimination of their common-law property rights nervously await their fates. In Ohio, landowners along the shore of Lake Erie sued the State for radically altering settled rules concerning their lakefront property rights. *State ex rel. Merrill v. State*, 2009 Ohio App. LEXIS 3653 (2009). The Ohio Department of Natural Resources for years asserted

that the strip of land along Lake Erie--between the water's edge and the high-water mark—is not private property, as has long been understood by littoral landowners. Instead, the State decreed the strip of land to be part of the public trust--even though there has never has been a public trust in Ohio along the Lake Erie shores! The Department of Natural Resources has gone as far as to charge private landowners who continue to use this land with lease fees.

The landowners prevailed in the trial and appeals courts--which rejected the state agency's calls to redefine well-established littoral rights--and the case is currently pending before the Ohio Supreme Court. Docket No. 2009-1806. Of course, there is no guarantee that the state high court will hold the line against the state agency.

Without definitive guidance from this Court as to the constitutional limits to their ability to redefine--or extinguish--common-law protections of property rights, states like Hawaii, Oregon, Ohio, and others will continue to push the envelope and seek to strip landowners of their rights without consequence. This makes the Court's resolution of questions surrounding the kinds of federal constitutional claims and remedies available to affected property owners all the more pressing.

CONCLUSION

As described above, the Court should grant the petition because it raises important unsettled questions of continuing national import.

DATED: October, 2010.

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In The
Supreme Court of the United States

MAUNALUA BAY BEACH OHANA 28, *et al.*,

Petitioners,

v.

HAWAII,

Respondent.

On Petition For Writ Of Certiorari To The Intermediate Court Of Appeals Of Hawaii

BRIEF OF LAND USE RESEARCH FOUNDATION OF HAWAII AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

In 2003, the Hawaii legislature adopted Act 73, which declared that the private right to own accretion on beachfront parcels was public property. The statute did not provide for compensation, and upon challenge by the Petitioners, a state trial court invalidated Act 73 as a regulatory taking.

The Intermediate Court of Appeals of Hawaii partially affirmed, concluding that Act 73 was a taking of accreted land in existence in 2003 when the Act became effective. It also concluded, however, that the statute was *not* a taking of "future accretion," or land that might be accreted after 2003, because there was no certainty that accretion would occur, and littoral owners' right to accretion was therefore not "vested." The court concluded the legislature was free to recharacterize the private right to accretion as state property without compensation because Petitioners never owned it. In other words, the right to accretion is not "property" as that term is used in the Fifth and Fourteenth Amendments.

The question presented is whether the right to accretion is property within the meaning of the Fifth and Fourteenth Amendments, and therefore protected from *ipse dixit* redefinition into public property.

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INTEREST OF AMICUS CURIAE

Land Use Research Foundation of Hawaii (LURF) is a private, non-profit research and trade association whose members include major Hawaii landowners, developers, and a utility company.[1] It is incorporated as a Hawaii non-profit corporation. LURF was established in 1979 to promote and advance the interests of the property owners and the development community, particularly in the areas of land use laws and regulations. Over the years, LURF has been a strong voice of reason, working to represent the interests of its membership and at the same time find common ground for the concerns of government, business, and the community.

One of LURF's missions is to advocate for reasonable, rational and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawaii's natural and cultural resources and public health and safety. In fulfilling this mission, LURF actively participates at the local, state, and federal levels of government, seeking passage and proper application of legislation and policies that create a favorable business climate in which

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[1] All counsel of record consented to the filing of this brief, and received notice of the intention to file this brief at least ten days before it was due. This brief was not authored in any part by counsel for either party, and no person or entity other than amicus made a monetary contribution toward the preparation or submission of this brief.

landowners, developers, and the business community can grow and improve the quality of life for the citizens of Hawaii.

LURF has participated as amicus curiae in numerous cases in Hawaii courts, and possesses a long history and an intimate familiarity with Hawaii property law. LURF is participating as amicus curiae in this case to voice its concern that the decision below, if left unreviewed by this Court, will do immeasurable harm to the constitutional protections afforded property owners nationwide, because it allows a legislature to undertake a massive uncompensated property grab simply by redefining a long-established private property right as public property.

SUMMARY OF ARGUMENT

To rescue Act 73 from total invalidity under the Takings Clause, the court below created a distinction never before recognized in Hawaii law between "vested existing accretions" which are constitutionally protected property, and "unvested future accretions," which are not. The latter, the court concluded, could be transformed *ipse dixit* by the Hawaii legislature into public property without compensation. After all, how could a littoral owner possess a property interest in land that had not yet accreted?

The supposed distinction between "existing" and "future" accreted land is illusory, however, and overlooks the critical private property interest which Act

73 redefined as public property. Hawaii law had for over a century recognized that littoral owners possessed the *right* to accretion. That right was a present right, was "vested," and, as surely as interest follows principal,[2] cannot be transformed by the stroke of the legislature's pen into public property. The Constitution – in addition to recognizing as property the accreted land in existence at the time of the adoption of Act 73 in 2003 – also protects the right to *all* accretion. Thus, when Act 73 declared that accretion belonged to the state, it confiscated private property without due process or condemnation, and violated the Fifth and the Fourteenth Amendments.

This brief focuses on two issues. *First*, the right to accretion is a present property interest protected by the Fifth and Fourteenth Amendments from uncompensated legislative redefinition as public property. This right is not limited merely as accreted land in existence on the day the legislature adopted Act 73, and the court below strayed far afield from this Court's established precedents when it concluded that the only property interest protected by the Constitution was

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[2] *See Phillips v. Washington Legal Foundation*, 524 U.S. 156, 165 (1998) ("The rule that 'interest follows principal' has been established under English common law since at least the mid-1700's . . . Not surprisingly, this rule has become firmly embedded in the common law of the various States.") (footnote omitted); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (a state may not abrogate "the traditional rule that 'earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property.' ").

the land already accreted. *Second*, to provide context to the lower court's decision and how it reached its conclusion, this brief summarizes the decades-long experiences of Hawaii's property owners who have seen their established common law property rights eroded into public property. The case at bar is only the latest example.

ARGUMENT

I. THE RIGHT TO ACCRETION IS A PRIVATE PROPERTY RIGHT

A. Accreted Land vs. The Right To Accretion

"Accretion" or "accreted" lands refers to land "gradually deposited by the ocean on adjoining upland property." *Hughes v. Washington*, 389 U.S. 290, 291 (1967). Until the Hawaii legislature adopted Act 73 in 2003, the common law of the Kingdom, Territory, and State of Hawaii conformed to traditional accretion law, with a pedigree reaching back to the Institutes of Justinian. Until Act 73 and the decision of the court below, Hawaii common law protected private accretion rights, and made no distinction between "existing" accreted land, and the right to "future" accretion. *See Halstead v. Gay*, 7 Haw. 587, 589-90 (1889) ("By the definitions we have given, it follows that the plaintiff has the rights of a littoral proprietor, and that the accretion is his.");

State ex rel. *Kobayashi v. Zimring*, 566 P.2d 725, 734 (Haw. 1977) ("When accretion is found, the owner of the contiguous land takes title to the accreted land."); *In re Banning*, 832 P.2d 724, 728 (Haw. 1992) ("Land now above the high water mark, which has been formed by imperceptible accretion against the shore line of grant, has become attached by the law of accretion to the land described in the grant and belongs to the littoral proprietor.") (*quoting Halstead*, 7 Haw. at 588). This Court long ago affirmed the same principle:

> *The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property.* The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one. The maxim "qui sentit onus debet sentire commodum" ["he who enjoys the benefit ought also to bear the burdens"] lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if, a gradual gain, it is his.

County of St. Clair v. Lovingston, 90 U.S. 46, 68-69 (1874) (emphasis added). *See also* Comment, *The Rights of a Riparian Owner in Land Lost by Erosion*, 24 YALE L.J. 162 (1914) ("The rules applying to accretion and erosion are inseparably bound together,

the gains of one compensating for the losses of the other."). It is this ancient balance – the littoral owner must take the bitter with the sweet – that compels the result: the ability to own accretion that may attach to a littoral parcel in the future is a present right because the littoral owner bears the risk of erosion now.

The accretion and erosion doctrines ensure that riparian and littoral property owners – short of a sudden avulsive or erosive event – maintain their parcel's access to water when the water's edge shifts naturally over time. *See Hughes*, 389 U.S. at 293. Very often, the most valuable feature of littoral property is its proximity and connection to ocean. In Act 73 the Hawaii legislature radically altered that ancient balance, supplanting the reciprocal system of accretion and erosion with a statutory scheme in which the public gains when littoral land either erodes or accretes. Act 73 simply decreed that the state owns it all. Under this one-sided regime, the state not only continues to acquire private lands lost to erosion, but also owns existing unregistered accreted lands and the right to future accretion, and no one but the state is able to register or quiet title to accreted land.

The court below correctly recognized that the Takings and Due Process Clauses prohibit the state from destroying settled expectations and confiscating private property rights by legislative fiat, and declaring – without even the minimal protections of pre-deprivation condemnation procedures and payment of

just compensation – that what had been a private right for centuries was, by the stroke of a pen, transformed into public property. *Maunalua Bay Beach Ohana 28 v. Hawaii*, 222 P.3d 441 (Haw. Ct. App. 2009). The court held that Act 73 was a taking because it expressly abolished the long-standing common law accretion rule, and transformed the reciprocal erosion-accretion equation into a one-way street: an owner still lost land when it eroded, but when it accreted, a formerly beachfront parcel would be fronted with a state-owned strip of beach.

However, the court held that because "future" accretion might never happen, the state could simply seize it without first paying compensation. *Maunalua Bay*, 222 P.3d at 460. The court held that Act 73 did not affect a taking of the right to accretion because the right is simply a contingent future interest. The court concluded, "any claims that Plaintiff may have to future accretions are purely speculative, and other courts have held that a riparian owner has no vested right to future accretions." *Id.* In effect, the court concluded that the only property subject to confiscation by Act 73 was *existing* accreted land.

But by focusing solely on the land in existence at the time of Act 73's adoption, the court below missed the intangible, but more critical property right being taken by the legislature – the right to *all* accretion – and, in effect, read that valuable right out of existence. In *Pritchard v. Norton*, 106 U.S. 124 (1882), this Court instructed that "property" is not limited to land

or tangible things, but included intangible rights, in that case a legal remedy for breach of contract:

> Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away.

Id. at 132. Thus, the right to accretion – which is a separate and distinct property right from accreted land, and includes within its meaning the "future accretions" the court below blithely ignored – was also taken when Act 73 declared it to be public property. *See Fidelity & Deposit Co. v. Arenz*, 290 U.S. 66 (1933) ("'Property' is a word of very broad meaning, and when used without qualification, expressly made or plainly implied, it reasonably may be construed to include obligations, rights and other intangibles as well as physical things.") (citations omitted).

As this Court explained in *Lovingston*, the right to accretion is a presently vested right because a littoral property owner bears the risk of erosion presently, so she should also reap any benefits if and when they occur. A "right" is "a power, privilege, faculty, or demand, inherent in one person and incident upon another." BLACK'S LAW DICTIONARY 1189 (5th ed. 1979). *See also* BLACK'S LAW DICTIONARY 551 (Pocket ed. 1996) (a right is "[a]n interest or expectation guaranteed by law[.]"). Thus, the very concept of a "right" includes within its meaning future interests

or expectations, even though those interests might never by realized.[3] It matters only that the right itself is a present interest. *See Hodel v. Irving*, 481 U.S. 704, 715 (1987) ("the right to pass on 'property' is itself a valuable right"). In *Hornsby v. United States*, 77 U.S. 224 (1870), this Court held:

> By the term property, as applied to lands, all titles are embraced, legal or equitable, perfect or imperfect. It was so held by this court in the case of *Soulard v. The United States*, when considering the import of the term in a stipulation contained in the treaty by which Louisiana was acquired, providing that the inhabitants of that territory should be protected in the enjoyment of their property. "It comprehends," said the court, "every species of title, inchoate or complete. *It is supposed to embrace those rights which are executory as well as those which are executed.*"

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[3] The reported Hawaii cases which involve accretion deal with land already accreted. *See, e.g., Halstead v. Gay*, 7 Haw. 587, 589-90 (1889) (action for trespass on accreted land seaward of the plaintiff's littoral property as described in his deed); *State* ex rel. *Kobayashi v. Zimring*, 566 P.2d 725, 734 (Haw. 1977) (state sought to quiet title to new land formed by active volcano); *In re Banning*, 832 P.2d 724, 728 (Haw. 1992) (action to register title to accreted land under Hawaii's Torrens title system). This should come as no surprise since only once land is actually accreted and becomes permanent would a property owner institute a judicial action to confirm title and ownership.

Id. at 242 (*quoting Soulard v. United States*, 29 U.S. 511) (1830) (Marshall, C.J.)) (footnote omitted) (emphasis added).

A hypothetical starkly illustrates the fallacy of the Hawaii court's rationale. Under the "future accretion" theory, a legislature would be free to enact a statute abolishing the right to pass property to one's heirs at death, and that instead, upon a person's death, all of her property becomes public property. The interests of a person's potential heirs, after all, are not "vested," and (in the Hawaii court's words) "may never materialize" because it is possible the heirs could be disinherited or could predecease the donor, before their interests vest. Thus, the theory goes, their rights are not "property" and the state may acquire them. That the right to bequeath and inherit are "property," and that such a scheme would violate the U.S. Constitution's Takings and Due Process Clauses is clear. *See, e.g., Babbitt v. Youpee*, 519 U.S. 234, 245 (1997) (ability to give property to heirs is itself a property right).

B. Accretion Follows Littoral Ownership As Interest Follows Principal

The right to accretion is property, even when the accretion has not yet taken place, and indeed, may never occur at all. The paradigm example of this principle is the traditional rule that interest follows principal. In two cases, this Court has held that interest on deposited funds is a property right

without regard to whether that interest had yet been earned, and that a state cannot simply reassign that property right to the public *ipse dixit* without running afoul of the Takings Clause.

In *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), this Court concluded that interest on lawyers' trust accounts is a property right. Under its Interest on Lawyers Trust Account (IOLTA) program, the Texas Supreme Court adopted a rule which required attorneys to place certain client funds that otherwise could not earn interest into a pooled interest-bearing IOLTA account. That interest, once earned, would be paid to a nonprofit corporation established by the Texas Supreme Court to deliver legal services to low income clients. This Court concluded that because "under Texas law the principal held in IOLTA trust accounts is the 'private property' of the clients," 524 U.S. at 164-65, and "[t]he rule that 'interest follows principal' has been established under English common law since at least the mid-1700's," the interest was Constitutional property. The Court rejected the state's claim that the interest follows principal rule was a matter purely of state law, and that Texas law had previously carved out an exception to the general rule. This Court examined Texas law and concluded it had always considered interest as following principal, and was therefore a property right. *Id.* at 168-69.

Similarly, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980), the Court held

that interest is traditionally an "incident of ownership," and that the state could not simply reassign interest on interpleaded funds to the state. This Court concluded that the interest was private property in words that also apply to the case at bar:

> Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the court. The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property. The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry.

Id. at 163.

Phillips and *Webb's Fabulous Pharmacies* establish that certain fundamental aspects of private property rights cannot be recharacterized by the state as public property. While the contours of what constitutes property is left mostly to definition by state legislatures and courts, *see, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979), it is well-accepted that the Takings and Due Process Clauses constrain a state from rewriting the accepted rules of property and declaring that what has always been private is now public. *See Webb's Fabulous Pharmacies*, 449 U.S. at 164 (the state may not, "by ipse dixit

. . . transform private property into public property without compensation"); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) ("the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits").

The case at bar presents the Court the opportunity to provide definitive guidance that "property" is not a completely malleable term, but rather embodies a core set of normative principles immunized by the Fifth and Fourteenth Amendments from a state's redefinition, especially where, as here, the result of state action is a naked declaration that what was private property is now public.

This Court has addressed the principle before, although never directly. *See, e.g., PruneYard Shopping Center v. Robins*, 447 U.S. 74, 93 (1980) (Marshall, J., concurring) ("I do not understand the Court to suggest that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the abrogation of common law rights by Congress or a state government. The constitutional terms 'life, liberty, and property' do not derive their meaning solely from the provisions of positive law. They have a normative dimension as well, establishing a sphere of private autonomy which government is bound to respect."); *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring) (government cannot wipe out property rights simply by legislating the property out of existence).

Common law rules of accretion are exactly the type of long-standing expectations which the Takings and Due Process Clauses were designed to protect from transfer to the public by a state court or legislature.[4] *See, e.g., Kaiser Aetna*, 444 U.S. at 179-80 ("we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation") (footnote omitted); *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 172 (1998) (interest on lawyer's trust accounts is private property); *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (passing property by inheritance is a fundamental attribute of property); *Babbitt v. Youpee*, 519 U.S. 234, 239 (1997) (the statue in *Hodel* was struck down because "[s]uch a complete abrogation of the rights of descent and devise could not be upheld."). In *PruneYard*, Justice Marshall concurred in the Court's holding that no judicial taking had occurred when the California Supreme Court concluded that California law required the owner of a shopping

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[4] It is irrelevant whether this case is viewed as a traditional regulatory taking by the legislature, or a judicial taking, since the Fourteenth Amendment's Due Process Clause incorporates the guarantees of the Fifth Amendment against the states, not merely state legislatures and state executive branches. U.S. Const. amend. XIV ("nor shall any State deprive any person of life, liberty, or property, without due process of law"). *See also Stop the Beach Renourishment, Inc. v. Florida Dep't of Envt'l Protection*, 130 S. Ct. 2592, 2601-02 (2010) (Scalia, J.) ("In sum, the Takings Clause bars the State from taking private property without paying for it, no matter which branch is the instrument of the taking.").

center to allow public handbilling on its property, but acknowledged:

> Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way. Indeed, our cases demonstrate that there are limits on governmental authority to abolish "core" common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.

PruneYard, 447 U.S. at 93-94 (Marshall, J., concurring). Justice Marshall noted that in *Ingraham v. Wright*, 430 U.S. 651 (1977), the Court determined the Due Process Clause prohibits abolishment of "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.* at 672-73, *quoted in PruneYard*, 447 U.S. at 94 n.3 (Marshall, J., concurring).

The ability to maintain a littoral parcel's physical contact with the ocean is not simply a unilateral expectation or a product of positive law, but an expectation "that has the law behind it." *Kaiser Aetna*, 444 U.S. at 178. Thus, it is property expressly protected by the Fifth and Fourteenth Amendments from arbitrary or capricious state action which includes a state legislative or court summarily altering established common law rules on which property owners have relied for more than a century.

C. In *Palazzolo*, This Court Rejected The "Notice" Theory

The court below distinguished between existing pre-2003 accreted land, and the right to future accretion, suggesting that littoral property owners from 2003 forward were on notice of the change in the law. When a legislature transfers valuable legal rights from an owner to the state (even when those interests may come into being in the future, or not at all), this Court has found a property interest exists, and that the legislation is a taking. For example, the Court invalidated as a taking a statute in which Congress determined that small interests in Indian land would escheat to the tribe and could not be passed to heirs by descent or devise. *Babbitt v. Youpee*, 519 U.S. 234, 245 (1977). Similarly, when the Florida legislature reassigned interest on monies which litigants deposited in the courts from the owners of the funds to the state, the Court found a taking, even though the interest had not yet been earned. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). The court below, however, ignored this point. It relied on three other cases, *Western Pac. Ry. Co. v. Southern Pac. Co.*, 151 F. 376 (9th Cir. 1907); *Cohen v. United States*, 162 F. 364 (C.C.N.D. Cal. 1908); and *Latourette v. United States*, 150 F. Supp. 123 (D. Or. 1957), to hold that "future accretion" was not property so the legislature could take it without consequence. *Maunalua Bay*, 222 P.3d at 460.

Other, more recent decisions from this Court have repudiated that rationale. For example, the

Ninth Circuit's statement, quoted by the court below that "there can be no question, we think, that the right to future possible accretion could be divested by legislative action," *Western Pac.*, 151 F. at 399 (quoted in *Maunalua Bay*, 122 Haw. at 53, 222 P.3d at 460), in addition to being contradicted by *Babbitt* and *Webb's Fabulous Pharmacies*, is directly at odds with the rejection of the "notice" defense in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). There, the state argued the property owner lost his right to claim a taking because it acquired the property after the regulation claimed to work a taking was adopted. *Palazzolo* dismissed the argument as "Hobbesian" –

> The theory underlying the argument that postenactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.
>
> The State may not put so potent a Hobbesian stick into the Lockean bundle . . . Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect,

> to put an expiration date on the Takings Clause.

Palazzolo, 533 U.S. at 626-27. The rationale of the court below was precisely the opposite, as evidenced by its conclusion that the Hawaii Constitution's "public trust" provision, Haw. Const. art. XI, § 1, "clearly diminishes any expectation that oceanfront owners in Hawaii had and may have in future accretions to their property." *Maunalua Bay*, 222 P.3d at 461 (*citing In re Water Use Permit Applications*, 9 P.3d 409, 447 (Haw. 2000)). This is very nearly a paraphrase of the "notice" defense rejected in *Palazzolo*.

II. HAWAII'S LONG HISTORY OF TRANSFERRING ESTABLISHED PRIVATE PROPERTY RIGHTS TO THE PUBLIC WITHOUT JUST COMPENSATION

The case at bar is the latest chapter in a long history of erosion of traditional common law property rights in Hawaii in favor of the public. The examples summarized in this section culminated with the Hawaii Supreme Court concluding that "the western concept of exclusivity is not universally applicable in Hawaii." *Public Access Shoreline Hawaii v. County of Hawaii Planning Comm'n*, 903 P.2d 1246, 1268 (Haw. 1995), *cert. denied*, 517 U.S. 1163 (1996). The summaries of these cases provides context to the decision in the case at bar, and reveal the "poor relation" status afforded long-standing common law property

rights in Hawaii. These cases show why this Court's review of the case at bar is vitally needed – to recognize that core property rights cannot be redefined without compensation.

In *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), a case in which the Ninth Circuit invalidated the Hawaii Supreme Court decision on judicial takings grounds, started out in 1959 in a Kauai county trial court as a dispute among several sugar plantations over which of them possessed the rights to surplus water in a Kauai stream. The parties based their claims on long-standing water law and prescriptive rights precedent of the Kingdom, Territory, and State of Hawaii. Nine years later, the trial court issued a 65-page decision based on that precedent, and declared who was entitled to what. At that stage, the case was just another in a long line of water disputes between private parties. The losing parties appealed to the Hawaii Supreme Court, where no party – including the State – argued the controlling water law was anything but as established by long-standing Hawaii precedent.

The Hawaii Supreme Court, however, "sua sponte overruled all territorial cases to the contrary and adopted the English common law doctrine of riparian rights." *Robinson*, 753 F.2d at 1470 (*citing McBryde Sugar Co. v. Robinson*, 504 P.2d 1330 (Haw. 1973)). The court "also held sua sponte that there was no such legal category as 'normal daily surplus water'

and declared that the state, as sovereign, owned and had the exclusive right to control the flow," and "that because the flow of the Hanapepe [stream] was the sovereign property of the State of Hawaii, McBryde's claim of a prescriptive right to divert water could not be sustained against the state." *Robinson*, 753 F.2d at 1470. In other words, in a dispute between "A" and "B" over which of them possessed water rights, the Hawaii Supreme Court simply declared "neither of you do, the State owns it all." But after a rehearing on a narrow issue of state law, during which the court rebuffed an attempt by the private parties to raise federal constitutional issues, the court reaffirmed the *McBryde* ruling, with two Justices dissenting. *See McBryde Sugar Co. v. Robinson*, 517 P.2d 26 (Haw. 1973) (per curiam) (*McBryde II*). One justice switched his vote from the first opinion, concluding that it was a "radical departure" from established law, and was a taking. *McBryde II*, 517 P.2d at 27 (Levinson, J., dissenting). This Court declined to review the Hawaii Supreme Court.

But that was not the last word. The sugar companies sued state officials in federal district court under 42 U.S.C. § 1983. The district judge held that the Hawaii Supreme Court's *McBryde* decision took property without just compensation, and enjoined the state from enforcing the decision. *See Robinson v. Ariyoshi*, 441 F. Supp. 559 (D. Haw. 1977). On appeal, the Ninth Circuit addressed the merits:

> The state conceded at oral argument that the Fourteenth Amendment would require it to

> pay just compensation if it attempted to take vested property rights. The substantive question, therefore, is whether the state can declare, by court decision, that the water rights in this case have not vested. The short answer is no.

Robinson, 753 F.2d at 1473. The court determined the water rights claimed by the private parties were vested rights, and that neither the state legislature nor the state supreme court could abrogate those private rights in favor of the public rights without condemnation and payment of just compensation.

In *In re Ashford*, 440 P.2d 76 (Haw. 1968), the Hawaii Supreme Court rejected over 100 years of its own precedent, which held the boundary between public and private property on Hawaii's beaches was the mean high water line. The *Ashford* court disregarded these established precedents and changed the legal boundary of littoral parcels from the mean high water line to the "upper reaches of the waves," effectively confiscating for the public 20 to 30 lateral feet of what had until then always been private property. *Ashford*, 440 P.2d at 77. The court reached this result by reinterpreting the term *ma ke kai* ("along the sea" in Hawaiian) in the parcel's royal patent, concluding the earlier cases all misunderstood the true meaning of the phrase. To reinterpret the meaning of *ma ke kai*, the court turned to oral testimony and reputation evidence regarding "customary" usage of the shoreline. *Id.* One Justice dissented, noting the majority relied on "spurious historical

assumptions," and concluded there was nothing in ancient tradition, custom, practice, or usage which dictated the use of the upper reaches of the waves instead of the mean high water mark as established by the earlier cases. *Ashford*, 440 P.2d at 93 (Marumoto, J., dissenting).

In *County of Hawaii v. Sotomura*, 517 P.2d 57 (Haw. 1973), *cert. denied*, 419 U.S. 872 (1974) the Hawaii Supreme Court sua sponte redefined the seaward boundary of a Torrens-titled littoral parcel from the high water mark to the "upper reaches of the wash of the waves," holding the county owed no compensation for the land seaward of the new boundary line because it was owned by the state. One Justice dissented, noting:

> I will not indulge in an extensive dissertation against the holding, for to do so will be but an exercise in futility. I merely point out that, in my opinion, the holding is plain judicial law-making. That is apparent from the quoted statement in the opinion that the holding is being made "as a matter of law," and from the following reason given therefor: "*Public policy, as expressed by this court*, favors extending to public use and ownership as much as possible of Hawaii's shoreline as is reasonably possible."

Sotomura, 517 P.2d at 189 (Marumoto, J., dissenting) (emphasis original). The property owners brought suit in federal district court for due process violations. The court determined "[j]udicial transfers of title to

private lands to the State which do not permit the owner an opportunity to be heard or to present evidence is not constitutionally valid." *Sotomura v. County of Hawaii*, 460 F. Supp. 473, 478 (D. Haw. 1978).

> Hawaii, the seaweed line was used to indicate the level of the high tides and high water mark. The decision in *Sotomura* was contrary to established practice, history and precedent and, apparently, was intended to implement the court's conclusion that public policy favors extension of public use and ownership of the shoreline. A desire to promote public policy, however, does not constitute justification for a state taking private property without compensation.

Id. at 480-81.

Relying on the public trust doctrine, in *Hawaii v. Zimring*, 566 P.2d 725 (Haw. 1977), the Hawaii Supreme Court ignored its prior precedent regarding construction of property descriptions on the shoreline and publicized extensions of land occurring after a lava flow. In 1955, the active volcano on the island of Hawaii created 7.9 acres of new land when lava flowed into the ocean. *Id.* at 727. The state assessed the littoral landowner property taxes on the new land, but thirteen years later sought to quiet title, asserting public ownership of the new land in itself. *Id.* at 738. The littoral owner's boundary description extended ownership to the "high water mark."

The Hawaii Supreme Court, however, disregarded the accepted meaning of this term, holding instead the description was merely a "natural monument" and not an "azimuth and distances" description. *Id.* at 745 (Vitousek, J., dissenting). Consequently, the court vested title to the new land in the state because to adhere to the deed's language would, in the court's view, result in an inequitable "windfall" that should not "enrich" any one landowner, but rather should inure to the collective public. *Id.* at 734-35.

Finally, in *Public Access Shoreline Hawaii v. County of Hawaii Planning Comm'n*, 903 P.2d 1246, 1268 (Haw. 1995), *cert. denied*, 517 U.S. 1163 (1996), the Hawaii Supreme Court redefined the nature of fee simple absolute ownership, and abandoned the "Western concept of exclusivity" to impose a blanket physical easement retroactively over all Hawaii property. The case arose as a dispute over the standing of native Hawaiians to intervene in an agency hearing regarding a coastal permit sought by a property owner. *Id.* at 1250. The agency denied standing, concluding the plaintiffs did not have interests different from the general public. The Hawaii Supreme Court determined that as native Hawaiians, the plaintiffs did possess unique rights, because custom dictated that Hawaii property owners never possessed the right to fully exclude native Hawaiians who wished to exercise "customary and traditional practices" on private property. *Id.* at 1268. The court found its decision did not work a taking because the custom was a "background principle" of Hawaii

property law, despite the fact it virtually eliminated the right to exclude. *Id.* at 1268 (*citing Stevens v. City of Cannon Beach*, 854 P.2d 449, 456 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994)).

Act 73 and the case at bar are simply the latest example of these kind of decisions from Hawaii's courts and legislature. This Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari to the Hawaii Intermediate Court of Appeals court should be granted.

Respectfully submitted,

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